

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1923

No. [REDACTED] 99

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,
PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. [REDACTED] 100

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. [REDACTED] 101

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

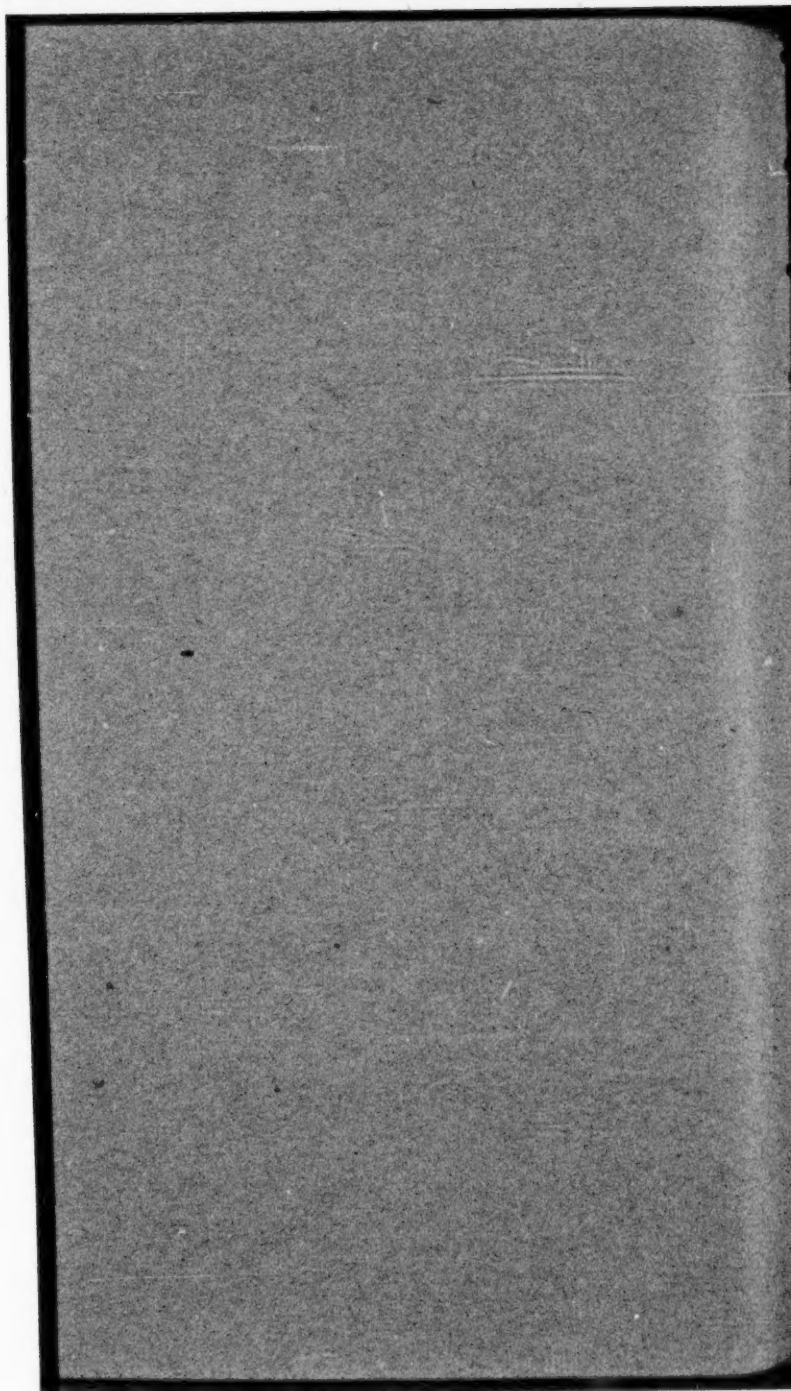
ANDREW J. CASEY, FORMER ACTING COLLECTOR OF
INTERNAL REVENUE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONS FOR CERTIORARI FILED AUGUST 5, 1923.

CERTIORARI AND RETURN FILED NOVEMBER 2, 1923.

(29,082, 29,083, 29,084)



(29,082, 29,083, 29,084)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 532.

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,
PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. 533.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL
REVENUE.

No. 534.

ARTHUR L. HOWARD AND ROBERT S. BARLOW,
TRUSTEES, PETITIONERS,

vs.

ANDREW J. CASEY, FORMER ACTING COLLECTOR OF
INTERNAL REVENUE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

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1 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of
the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said District Court, before you,
between Arthur L. Howard, of Cambridge, Massachusetts, and Robert
S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket
Trust, so-called, plaintiffs, and John F. Malley, of 142 Fuller Street,
Brookline, Massachusetts, with place of business at 15 State Street,
Boston, Massachusetts, defendant, a manifest error hath happened,
to the great damage of the said defendant as by his complaint appears:
We being willing that error, if any hath been, should be duly
corrected, and full and speedy justice done to the parties aforesaid
in this behalf, do command you, if judgment be therein given, that

2 then under your seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concerning the
same, to the United States Circuit Court of Appeals for the
First Circuit, together with this writ, so that you have the same at
the city of Boston, Massachusetts, on the twentieth day of April
next, in the said Circuit Court of Appeals, that, the record and proceedings
aforesaid being inspected, the said Circuit Court of Appeals
may cause further to be done therein to correct that error, what of
right, and according to the laws and customs of the United States,
should be done.

Witness the Honorable William H. Taft, Chief justice of the
United States, the twenty-fourth day of March, in the year of our
Lord one thousand nine hundred and twenty-two.

JAMES S. ALLEN,

*Clerk of the District Court of the
United States, District of Massachusetts.*

Allowed by

J. M. MORTON, JR.,

U. S. District Judge.

Return of District Court on Writ of Error.

DISTRICT OF MASSACHUSETTS, ss:

District Court of the United States.

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and seal of the said Court this twentieth day of April A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

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TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 1179, Law Docket.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs,

v.

JOHN F. MALLEY, Former Collector of Internal Revenue, Defendant.

The Writ and Declaration in this cause were filed in the clerk's office of this court on the twenty-first day of January, A. D. 1920, and are in the words and figures following:

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. s.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, in our District of Massachusetts, to the value of five hundred (500) dollars, and to summon the said defendant (if he may be found in your district) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, then and there, in our said court, to answer unto Arthur L. Howard of Cambridge, Massachusetts, and Robert S.

Barlow, of Boston, Massachusetts, as trustees of the Haymarket Trust, so-called, in an action of contract.

To the damage of the said plaintiffs (as they say) the sum of five hundred (500) dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston,
the sixteenth day of January, in the year of our Lord one thousand nine hundred and twenty.

JOHN E. GILMAN, JR.,
Deputy Clerk.

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, January 20, 1920.

Pursuant hereunto I have this day at — o'clock and — minutes, — M., attached a chip as the property of the within named John F. Malley; and afterward on the same day I summoned the within named John F. Malley to appear at court and answer by giving to him in hand at Boston in said district an original summons to this writ.

JOHN J. MITCHELL,
United States Marshal,
By JOHN H. BACKUS,
Deputy.

Fees: Service.....	\$2.00
Travel06
	<hr/>
	\$2.06

Declaration.

[Filed January 21, 1920.]

Now come the plaintiffs and for cause of action say as follows:

1. The plaintiffs are and at all times since December 15, 1917, have been the trustees under a certain instrument or declaration of trust dated October 10, 1900, a copy of which marked "A" is hereunto annexed and made a part hereof.

2. The defendant, John F. Malley, prior to June 30, 1918, and at all times thereafter until September 1, 1919, was the Collector of Internal Revenue for the Third District of Massachusetts.

3. Under the said declaration of trust dated October 10, 1900, the plaintiffs, as trustees as aforesaid, at all times since December 15, 1917, have owned certain real estate located on Canal and Friend

Streets in the City of Boston in said Third District of Massachusetts, numbered 82-98 Canal Street and 171-177 Friend Street,
5 having a fair value in excess of ninety-nine thousand (99,000) dollars and they also have owned certain bonds having a fair value in excess of twenty thousand (20,000) dollars.

4. On or about the thirty-first day of July, 1919, the Commissioner of Internal Revenue of the United States required the plaintiffs to file a certain return on a form numbered 707 prescribed by said Commissioner of Internal Revenue showing the fair market value of the property held by the plaintiffs as trustees as aforesaid under the said declaration of trust and further required that the said return be prepared by the plaintiffs as if for a corporation, joint-stock company or association known as the Haymarket Trust, and thereupon, on or about the twenty-fourth day of September, 1918, the plaintiffs, in accordance with the requirement of the said Commissioner of Internal Revenue, filed such a return with the defendant as Collector of Internal Revenue for the Third District of Massachusetts.

5. Thereafter the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1916, purported to assess a capital stock tax of seventy-four and 50/100 (74.50) dollars upon the plaintiffs as trustees as aforesaid, and upon the said Haymarket Trust, for the year ending the thirtieth day of June, 1919.

6. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, joint-stock company or association within the meaning of the said Revenue Act of 1916 and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust or in or to the income, rents, issues or profits under the terms, trusts or provisions of said instrument of October 10, 1900, constitute or ever have constituted a corporation, joint-stock company or association, or any other taxable body within the meaning of the said Revenue Act of 1916, and that
6 the said return was wrongfully and unlawfully required of the plaintiffs and the said tax assessed as aforesaid was wrongfully and unlawfully assessed.

7. On or about the third day of January, 1919, the said defendant as Collector of Internal Revenue for the Third District of Massachusetts, sent a bill to the plaintiffs for the capital stock tax assessed as aforesaid and made demand upon the plaintiffs as trustees as aforesaid to pay the said tax of seventy-four and 50/100 (74.50) dollars, and thereupon in compliance with said demand, the plaintiffs, as trustees as aforesaid, on the seventh day of January, 1919, paid to the defendant as Collector of Internal Revenue as aforesaid, the said sum of seventy-four and 50/100 (74.50) dollars, but under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said tax and the demand

made upon them by the defendant were both illegal and that the payment was unlawfully required of them.

8. Thereafter, on or about the seventh day of January, 1919, the defendant in writing acknowledged the receipt of the said payment made under protest.

9. Thereafter, on or about the twelfth day of November, 1919, the plaintiffs duly claimed that the moneys paid by them as aforesaid to the defendant be refunded by application therefor in writing to the said Commissioner of Internal Revenue.

10. Thereafter, on or about the ninth day of January, 1920, the said claim for refund was denied by the Commissioner of Internal Revenue and notice of such denial was given to the plaintiffs by letter dated January 9, 1920.

11. And the plaintiffs say, by reason of the facts aforesaid, they are entitled to recover from the defendant the sum of seventy-four and 50/100 (74.50) dollars paid by them under protest to the defendant, with interest thereon from the seventh day of January, 1919.

By Their Attorneys, DUNBAR, NUTTER & McCLENNEN,
By JACOB J. KAPLAN,
Of the Firm.

7 [MEMORANDUM.—The declaration of trust, referred to in the foregoing declaration as annexed, is here omitted. It appears of record, with the names of the trustees and the names of the subscribers and the respective amounts of their subscriptions, as part of the finding of facts and will be found printed on page 34 of this Transcript of Record. James S. Allen, Clerk.]

Upon the filing of the writ and declaration herein, an order to plead was entered.

On the twentieth day of February, A. D. 1920, the following Answer was filed:—

Defendant's Answer.

[Filed February 20, 1920.]

Now comes the defendant in the above entitled action and for answer says that the plaintiffs were required and obligated to make a return and to pay an excise tax, a so-called capital stock tax, for the taxable period of July 1, 1918, to June 30, 1919, under the Revenue Act of 1918, with respect to carrying on and doing business equivalent to one dollar for each one thousand dollars of so much of the fair average value of their capital stock for the preceding year ending June 30 as is in excess of five thousand dollars; that the plaintiffs on or about September 24, 1918, made a capital stock tax return on Form 707, showing their capital stock tax for said taxable period to be \$74.50; that on or about October, 1918, plaintiffs were

assessed a capital stock tax of \$74.50 for said taxable period based on said return; that on or about January 7, 1919, the plaintiffs paid said capital stock tax of \$74.50; that subsequently, on or about November, 1919, the Commissioner of Internal Revenue in pursuance of his duties made an examination of said return and ascertained that the plaintiffs were obligated and liable under the Revenue Act of 1918 for a capital stock tax for said taxable period of \$243.00 and that there was therefore \$168.50 more due and owing from the plaintiffs to the United States under the Revenue Act of 1918 as a capital stock tax for said period; that the Commissioner of

8 Internal Revenue by a letter dated about November 3, 1919, notified the plaintiffs that there was in his opinion \$168.50 additional capital stock tax due from the plaintiffs to the United States for a capital stock tax for said taxable period, and that unless such information as would justify a change was received within thirty days an assessment would be made on the next list; that the plaintiffs did not within said thirty days furnish the Commissioner of Internal Revenue information that would in his opinion justify a change; that the Commissioner of Internal Revenue in compliance with his duties and obligations on or about December, 1919, assessed the plaintiffs an additional capital stock tax for said taxable period of \$168.50; that on or about January 23, 1920, the plaintiffs were notified of said additional assessment for a capital stock tax for said taxable period; that the plaintiffs on or about January 27, 1920, paid said additional capital stock tax assessment of \$168.50 for said taxable period.

And further answering, the defendant denies each and every material allegation, item, count and particular in the plaintiff's writ and declaration contained.

THOMAS J. BOYNTON,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.

This cause was thence continued from term to term to the December Term, A. D. 1920, when, to wit, December 29, 1920, this cause came on to be heard by the court, without a jury, with case entitled "No. 1322, Law, Arthur L. Howard et al., Trustees, v. Andrew J. Casey, Acting Collector."

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, finding of facts and memorandum of decision was filed.

9 This cause was thence continued to the present December Term, A. D. 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant, within extended time, and is allowed by the court on March 4, 1922.

On the fourth day of March, A. D. 1922, the following Agreement for Judgment is filed:—

Agreement for Judgment.

[Filed March 14, 1922.]

It is hereby mutually agreed that judgment for the plaintiffs may be entered forthwith upon the findings of the court as of this thirteenth day of March, 1922, in the sum of \$74.50 damages with interest on said sum from the date of payment in the sum of \$14.22 and their costs of suit taxed at \$—.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Plaintiff.

ROBERT O. HARRIS,
United States Attorney;

FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Thereupon, to wit, March 14, 1922, it is considered by the court that the said Arthur L. Howard and Robert S. Barlow, trustees, plaintiffs, recover from the said John F. Malley, former collector, defendant, on the finding of the court, the sum of eighty-eight dollars and seventy-two cents (\$88.72) damages and their costs of suit taxed at —.

Defendant's Bill of Exceptions.

[Filed February 1, 1922, Within Extended Time; Allowed March 4, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of the Haymarket Trust to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed under the requirement of Title

IV, Sec. 407, of an Act entitled "An Act to Increase the Revenue and for other purposes," approved September 8, 1916 (39 Stat. 756).

The plaintiffs' declaration alleges in substance that the Haymarket Trust is not an association subject to said taxes within the meaning of said Act.

All the material facts of the case are contained—

(1) In the agreement and declaration of trust which was annexed to and made a part of the plaintiffs' declaration and which is incorporated in this bill of exceptions by reference;

(2) In the findings of facts made by the court and the copies of records and documents referred to therein as "attached hereto" and filed in this case.

This case was tried before Judge Morton, without a jury, who made and filed certain findings of facts. Said findings of facts,

together with copies of records and documents referred to therein as "attached hereto," are as follows:

"In September, 1900, Charlotte A. Baker and Charles G. Rice, joint owners of a piece of property commonly known as the Wakefield Building, situated on Travers Street, Boston, in the Commonwealth of Massachusetts, gave to George Burroughs, of said Boston, an option to purchase this property, subject to an existing mortgage of \$180,000, for \$245,000. The property was at that time rented to a number of tenants who used the same for store and office purposes, the owners furnishing heat, water, light, janitor and elevator service.

"Burroughs suggested to John D. Bryant the purchase of this property as trustee, subject to the outstanding mortgage, and that the funds be secured by subscription from persons who would hold the beneficial interest in the property. The proposition was that he secure \$250,000, which included an excess of \$5,000 over the purchase price which was to cover initial expenses. Said John D. Bryant and Frank E. Sweetser, of Brookline, in said Massachusetts, consented to act as trustee under an agreement, and on or
11 about September 27, 1900, said Burroughs assigned his option to purchase the so-called Wakefield Building to said Bryant and Sweetser.

"On or about October 10, 1900, an agreement, called an agreement and declaration of trust, a copy of which is attached to the plaintiff's declaration, and is attached hereto, was signed by said John D. Bryant and said Frank E. Sweetser, designated as trustees therein, and was also signed on or about said date or shortly subsequent thereto by said John D. Bryant and said Frank A. Sweetser as subscribers or shareholders with the amount of their subscription and share set opposite their names, and also by twenty-seven other persons with the amount of their subscription set opposite their names as appears in the copy of the trust instrument filed with the plaintiff's declaration.

"The copy of the trust instrument, together with certain other copies of records and documents referred to herein as 'attached hereto,' are, I find, true copies.

"On November 28, 1900, said Bryant and said Sweetser, the assignees of the aforesaid option, directed Burroughs to exercise this option to purchase, which direction Burroughs forthwith followed. On December 7, 1900, said Bryant and said Sweetser, designated as trustees in the aforementioned agreement, called upon the subscribers to the said agreement to pay the amounts of their subscriptions, which were paid, and on January 1, 1901, said Bryant and said Sweetser, as 'trustees' under said agreement, received a deed conveying the said property to them as 'trustees' of the Haymarket Trust.

"Said Burroughs received a commission from said Baker and said Rice for the sale of the said property, and in addition, received a commission of \$2,500 from the 'trustees' for obtaining subscriptions to the shares to be issued under the terms of the agreement.

"Each subscriber to the aforesaid agreement received a certificate setting forth the number of shares owned by him. A copy of such certificate with the form of transfer or power of attorney which appears on the same is attached hereto.

"The original 'trustees' and their successors have continuously managed the property in accordance with said agreement. They have paid the interest on the mortgage indebtedness as it came due, have provided janitor and elevator service for the tenants, have made necessary repairs, have collected the rents due, sought new tenants when there were vacancies, made leases, and performed all other duties incident to and necessary in the management of a store and office building. The 'trustees' have periodically distributed to the shareholders of record at the time of such distribution the net income from the property, with the exception of \$20,000, used to liquidate a portion of the mortgage indebtedness; \$60,000, invested in railroad bonds, and \$15,000, invested in Liberty bonds, which the 'trustees' now hold as a general reserve fund. The interest received by the 'trustees' from the railroad bonds amounting to \$6,000 and from the Liberty bonds amounting to \$15,000 has been credited by them to income and paid out to the shareholders in the same manner as other income received by the 'trustees.' The 'trustees' have received as compensation for their services five per cent. of the total yearly income in accordance with the terms of said agreement.

"The 'trustees' have purchased with the funds in their possession fifty shares of the Haymarket Trust, which shares have been transferred into the name of George M. Amerige and are held in this way for convenience.

"On frequent occasions the Haymarket Trust has sent out notices to the shareholders and the following is a fair illustration of such a notice and appears in the record book:

'Boston, Mass., June 22, 1920.

To the Shareholders of The Haymarket Trust:

Owing to increase in City of Boston taxes, Federal Income taxes, increased cost of coal, repairs and labor, and inability as yet to correspondingly increase rentals, your trustees are obliged to reduce the usual dividends of \$1.50 per share to \$1.00 per share.

Beginning with this date dividends will be paid on June 22nd and December 22nd in each year instead of January 15th and July 15th, as heretofore. A check for dividends at \$1.00 per share is enclosed herewith.

Respectfully,

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

"The 'trustees' have annually made up a statement for the shareholders, and as fair samples of the same two such are attached hereto. The actions and activities of the shareholders have been limited to the powers conferred in said agreement. There has been an annual

meeting of the shareholders each year during the existence of said agreement and in connection with said annual meeting proxies have been sent to the shareholders for their use in the event that they could not be present. A copy of a proxy is attached hereto. The record book kept by the 'trustees' referred to in said agreement contains records of the annual meetings of the shareholders, and certain excerpts from said records are attached hereto.

"At the annual meetings under said agreement the shareholders have on three occasions filled vacancies in the office called 'trustees' under said agreement, to wit: On January 18, 1905, Arthur L. Howard was elected by the shareholders present in person and by proxy

(1,730 shares) to fill the vacancy caused by the death of
14 Frank E. Sweetser; on January 17, 1912, Arthur D. Hill was elected by the shareholders present in person and by proxy (2,040 shares) to fill the vacancy caused by the death of John D. Bryant; and on January 16, 1918, Robert S. Barlow was elected by the shareholders present in person and by proxy (1,761 shares) to fill the vacancy caused by the resignation of Arthur D. Hill.

"At one annual meeting of the shareholders the date of the annual meeting was changed from the second Wednesday in December to the third Wednesday of January. There have been no other amendments to the trust instrument.

"At each annual meeting the shareholders have approved the annual report of the 'trustees,' such reports being similar to the copies of annual statement attached hereto. At an annual meeting January 18, 1905, and on January 17, 1912, the shareholders voted that a letter of condolence be sent to the families of Frank E. Sweetser and of John D. Bryant, respectively. The shareholders have never voted authority to the 'trustees' to sell the property and there has never been a request for a special meeting of the shareholders.

"The power and right to transfer a shareholder's interest has been largely exercised and about one-half of the original shareholders have transferred their interest under the agreement, and such transfers have been duly entered in the transfer books kept by the 'trustees' pursuant to the terms of the said agreement. Whenever there has been a transfer by a shareholder under the said agreement a new certificate has been issued by the 'trustees,' designating the number of shares owned by the new person to whom the transfer is made. The list of shareholders under said agreement on July 15, 1918, and the number of shares held by each is attached hereto. A. L. Howard referred to in this list of shareholders is Arthur L. Howard,

'Trustee,' who individually owns forty-two shares. Robert S.
15 Barlow, the other 'trustee,' individually owns no shares, but he is one of the partners of the law partnership of Hill, Barlow & Homans, who hold 338 shares in their name for various trusts and accounts. At the annual meeting in 1919 the following is a list of the shareholders present in person and by proxy, with the number of shares which they represented at said meeting:

	Shares.
George M. Amerige (individually)	50
do. Treas., Weber Corp.	250
do. (individually)	34
Arthur L. Howard (individually)	10
do. Trustee u/w M. D. Carter	40
do. " u/w J. O. Sargent	45
do. " Sargent Trust	28
Nettie B. Dobbins	338
Robert S. Barlow, of Hill, Barlow & Homans, representing ..	
	<hr/> 795

"The plaintiffs in this action have been the 'trustees' under said agreement at all times since December 15, 1917.

"The Commissioner of Internal Revenue of the United States required certain returns on Form 707 prescribed by said Commissioner to be filed for the Haymarket Trust, showing the fair market value of the property held by the plaintiffs under said agreement, and further required said returns to be prepared as an association known as the Haymarket Trust, and thereupon the plaintiffs in accordance with the requirement of said Commissioner filed such returns incorporated herein by reference with the Collector of Internal Revenue for the Third District of Massachusetts.

"Thereafter, on or about October 17, 1918, said Commissioner assessed the Haymarket Trust a capital stock tax of \$74.50, basing the amount of said tax on the Revenue Act of 1916 in force at

16 that time and upon the basis of information returned for the Haymarket Trust on Form 707 filed with the Collector of Internal Revenue at Boston for the Haymarket Trust on September 24, 1918, covering the period from July 1, 1918, to June 30, 1919.

"Thereafter, the defendant, John F. Malley, as Collector for the Third District of Massachusetts, on or about January 3, 1919, sent a notice to the Haymarket Trust of the assessment of the capital stock tax as aforesaid and made demand upon the Haymarket Trust to pay the said tax, to wit: \$74.50, for the said period from July 1, 1918, to June 30, 1919. Thereupon, in compliance with notice and demand incorporated herein by reference from the defendant Collector, the plaintiffs, as 'trustees' under said agreement, on the 7th day of January, 1919, paid the defendant, as Collector, \$74.50, under written protest incorporated herein by reference made and delivered to the defendant at the time of the payment.

"Thereafter after the passage on February 24, 1919, of the Revenue Act of 1918, the Commissioner of Internal Revenue in pursuance of his duties, made an examination of the return on Form 707 for the Haymarket Trust and concluded that the Haymarket Trust was obligated and liable under the Revenue Act of 1918 for a capital stock tax for the said taxable period from July 1, 1918, to June 30, 1919, of \$243.00 and that there was \$168.50 capital stock tax due and owing from the plaintiffs to the United States under the Revenue Act of 1918 for said taxable period in addition to the said amount of \$74.50 before referred to. The Commissioner of Internal Revenue

by letter dated November 3, 1919, notified the plaintiff that there was in his opinion \$168.50 additional tax due from the plaintiffs to the United States for a capital stock tax for said period and that unless such information as would justify a change was received
 17 within thirty days, an assessment would be made on the next list. The plaintiffs did not within said thirty days furnish the Commissioner of Internal Revenue information that would in his opinion justify a change. The Commissioner of Internal Revenue thereupon on or about December, 1919, assessed the plaintiffs an additional capital stock tax for said taxable period, to wit: from July 1, 1918, to June 30, 1919, of \$168.50. On or about January 3d, 1920, the plaintiffs were notified of said additional assessment of capital stock tax for said taxable period. The plaintiffs on or about January 27, 1920, paid said additional capital stock assessment of \$168.50 for said taxable period, to wit: from July 1, 1918 to June 30, 1919.

"Thereafter, the plaintiffs requested that the moneys to wit: \$74.50, paid by them as aforesaid to the defendant be refunded by an application therefor in writing, incorporated herein. Thereafter, said claim for refund was denied by the Commissioner of Internal Revenue and notice of said denial was given to the plaintiffs by a letter dated January 9, 1920, a copy of which letter is attached hereto. The said amount of \$74.50 has not been repaid to the plaintiffs."

Copy of Certificate.

No. —.

Haymarket Trust.

Shares.

This certifies that — of — the owner of — shares of the par value of one hundred dollars each, issued under an Agreement and Declaration of Trust, establishing the Haymarket Trust, dated October 10, 1900, and recorded with Suffolk County, Massachusetts, Deeds, Libro 2728, Fol. 33, to the terms of which instrument the holder hereof assents by the acceptance of this certificate.

Shares represented by this certificate are transferable only by written assignment, substantially as per form hereon, by the record owners or their legal representatives, in person or by attorney, upon the books of the trustees, on surrender of this certificate.

18 In witness whereof, the Trustees set their hands at Boston, this — day of —, A. D. 19—.

Trustees of the Haymarket Trust.

Form of Transfer.

For Value Received, — hereby assign and transfer to — Share of the Haymarket Trust, represented by the within certificate, and hereby constitute and appoint — attorney irrevocably, with power of substitution, to transfer the same upon the books of the Trustees

Dated, — — 191—, in presence of

— — —.

Haymarket Trust.

Principal Account for 1918.

CR.

Dr.			
To Capital Stock.....	\$250,000.00	By land and buildings....	\$410,000.00
" Mortgage	160,000.00		
	<u>\$410,000.00</u>		<u>\$410,000.00</u>

Income Account for 1918.

To balance from last a/c.	\$8,462.48	By one year's expense of	\$8,692.89
" rents received.....	34,716.69	running building....	
" dividends on 50 shs		" one year's interest on	6,400.00
Haymarket Trust...	150.00	mortgage	2,928.96
" interest on \$6,000		" one year's insurance..	
Northern Pacific		" City of Boston taxes	8,098.40
Great Northern		for 1918.....	
Joint 4s, to Jan. 1,		" Federal Income Tax	892.83
1919	240.00	for 1917.....	
" interest on \$10,000 U.		" State Income Tax for	52.65
S. 2d Liberty Loan		1917	1,793.60
4½	412.50	" Trustees' commissions.	
" interest on deposits..	352.41	dividends:	
" carried to Investment		1½% July 15, 1918
Account	5,000.00	1½% Jan. 15, 1919..	7,500.00
		" purchase of \$5,000 U.	
		S. 4th Liberty Loan	
		4½s	5,000.00
		" carried to contingent	
		Fund	5,000.00
		" balance Jan. 15, 1919.	2,974.08
	<u>\$49,334.08</u>		<u>\$49,334.08</u>

Trial Balance.

Land and buildings.....	\$410,000.00	Capital Stock.....	\$250,000.00
Value of unexpired Insur-		Mortgage	160,000.00
ance	2,987.56	Interest on Mortgage Oct.	
Investments	25,077.50	20, 1918, to Jan. 1, 1919.	1,280.00
Cash in State Street Trust		Income Account.....	2,974.75
Company	1,328.71		
Cash in Metropolitan		Contingent Fund.....	26,263.75
Trust Company.....	1,124.73		
	<u>\$440,518.50</u>		<u>\$440,518.50</u>

Boston, January 15, 1919.

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

Haymarket Trust.

Dr.	Principal Account for 1919.	Cr.
To Capital Stock.....	\$250,000.00	By Land and Building... \$410,000.00
" Mortgage	160,000.00	
	<u>410,000.00</u>	<u>\$410,000.00</u>

Income Account for 1919.

To balance from last a/c.	\$2,974.75	By one year's expense of	
" rents received.....	36,346.05	running building....	\$10,314.12
" dividends on 50 shs		" one year's interest on	
Haymarket Trust...	150.00	mortgage	6,400.00
" interest on \$6,000		" one year's insurance..	1,890.35
Northern Pacific		" City of Boston taxes	
Great Northern		for 1919.....	9,015.25
Joint 4s, to Jan. 1,		" Federal Income Tax	
1920	240.00	for 1918.....	641.12
" interest on \$1,000 U. S.		" State Income Tax for	
2d Liberty Loan		1919	38.50
4 1/4s	425.00	" Capital Stock Taxes..	180.75
" interest on \$5,000 U. S.		" Trustee's commissions.	1,877.25
4th Liberty Loan		" dividends:	
4 1/4s	207.25	1 1/2% July 15, 1919..
" interest on deposits...	177.60	1 1/2% Jan. 15, 1920..	7,500.00
		" balance Jan. 15, 1920.	2,663.35
	<u>\$40,520.65</u>		<u>\$40,520.65</u>

20

Trial Balance.

Land and Buildings.....	\$410,000.00	Capital Stock.....	\$250,000.00
Value of unexpired insur-		Mortgage	160,000.00
ance	4,120.90	Interest on Mortgage Oct.	
Investments	25,077.50	20, 1919, to Jan. 1, 1920.	1,280.00
Cash in State Street Trust		Income Account.....	2,663.35
Company	943.82		
Cash in Metropolitan		Contingent Fund.....	26,263.75
Trust Company.....	64.88		
	<u>\$440,207.10</u>		<u>\$440,207.10</u>

Boston, January 15, 1920.

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

(Copy.)

"Know all men by these presents, That — the undersigned Stockholder in the Haymarket Trust do hereby appoint — — true and lawful attorney, with power of substitution for — and in — name, to vote at the meeting of the stockholders in said Haymarket Trust to be held at — or at any adjournment thereof, with all the powers — should possess if personally present, hereby revoking all previous proxies.

—, 19—.

—, —."

Witness:

— —.

In the Record Book of the Haymarket Trust the following is record of the annual meeting of the shareholders held January 16, 1918:

"Jan. 16, 1918.

The Seventeenth Annual Meeting of the shareholders of the Haymarket Trust was held at the office of Arthur L. Howard, 53 State Street, Boston, Mass., at twelve o'clock, noon, Wednesday, January 16, 1918, pursuant to notice duly sent more than seven days before the date of the meeting, a copy of which notice is as follows:

Haymarket Trust.

Boston, Mass., January 5, 1918.

The annual meeting of the shareholders of the Haymarket Trust will be held at the office of Arthur L. Howard, Room 1047, 53 State Street, Boston, at 12 o'clock noon on Wednesday, January 18, 1918.

If you do not intend to be present at this meeting please sign and return the enclosed proxy.

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees.

A notice, of which the foregoing is a true copy, was sent by mail, postage prepaid, January 7, 1918, to shareholders of record at that date.

NETTIE B. DOBBINS.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk:

Boston, Jan. 16, 1918.

Subscribed and sworn to before me.

GEORGE M. AMERIGE,
Justice of the Peace.

There were present in person or by proxy the holders of seventeen hundred and sixty-one (1,761) shares. On motion duly made and seconded Arthur L. Howard was chosen Chairman.

The record of the last annual meeting was read and approved.

The report of the trustees for the year 1917 was submitted, discussed, and on motion duly made and seconded was approved and ordered placed on file.

The chairman then reported the resignation, Dec. 14, 1917, of Arthur D. Hill, formerly co-trustee, and the appointment by the remaining trustees in accordance with the provisions of the trust deed, of Mr. Robert S. Barlow to fill the vacancy caused by said resignation until the next annual meeting; and that therefore it would now be necessary to vote formally for a trustee.

22 The shareholders then proceeded to vote for a trustee; and all the shares voted being cast for Mr. Robert S. Barlow he was declared duly elected a trustee of the Haymarket Trust. No further business coming before the meeting, Adjourned.

Attest:

ARTHUR L. HOWARD,
Chairman.

Countersigned:

ARTHUR L. HOWARD,
ROBERT S. BARLOW,
Trustees."

"Boston, July 10, 1918.

At a meeting of the Trustees of the Haymarket Trust held this day it was voted that a dividend of $1\frac{1}{2}\%$ for the six months ending July 1, 1918, be paid on and after July 15, 1918, to shareholders of record July 1, 1918.

ARTHUR L. HOWARD,
Trustee."

The following is an illustration of the votes of the Trustees entered in the Record Book, declaring a semi-annual dividend. The trustees met twice a year and passed such a vote, the language in each case being almost identical with that quoted here.

"Boston, January 10, 1919.

At a meeting of the trustees of the Haymarket Trust, held, this day, it was voted that a dividend of $1\frac{1}{2}\%$ for the six months ending January 1, 1919, be paid on and after January 15, 1919, to shareholders of record January 1, 1919.

ARTHUR L. HOWARD,
Trustee."

During each year of the existence of this Trust there has been an annual meeting held in pursuance to a notice and there appears in the record book of the Haymarket Trust an entry of the annual meeting held Jan. 15, 1919, which is a fair sample and illustration of the record of these annual meetings;

23

Boston, January 15, 1919.

Eighteenth Annual Meeting.

Pursuant to notice duly given, the eighteenth annual meeting of the shareholders of the Haymarket Trust was held on Wednesday, January 15, 1919, at twelve o'clock noon at the office of Arthur L. Howard, Room 1047, 53 State Street, Boston, Mass. Mr. Howard called the meeting to order and was duly appointed chairman.

There were present at the meeting the holders of seven hundred and ninety-five shares. The records of the last annual meeting were read and approved. The report of the Trustees for the year 1918 was submitted, discussed, accepted and ordered placed on file. No further business coming before the meeting.

Adjourned.

Attest:

ARTHUR L. HOWARD,
Chairman.

Countersigned:

ROBERT S. BARLOW,
Trustee."

"January 21, 1920.

Nineteenth Annual Meeting.

Pursuant to notice duly given, the Nineteenth Annual Meeting of the shareholders of the Haymarket Trust was held on Wednesday, January 21, 1920, at twelve o'clock noon at the office of Arthur L. Howard, Room 1047, 53 State, Boston, Mass. Mr. Howard called the meeting in order and was duly appointed Chairman. There were present at the meeting and represented by proxies the holders of Fourteen Hundred six shares. The records of the last Annual Meeting were read and approved. The report of the Trustees for the year 1919 was submitted, discussed, accepted, and ordered placed on file.

No further business coming before the meeting. Adjourned.

Attest:

ARTHUR L. HOWARD,
Chairman.

Countersigned:

ROBERT S. BARLOW,
Trustee."

24 *Shareholders of Haymarket Trust July 15, 1918, and Number of Shares Held by Each.*

Name.	No. of shares.	
George M. Amerige	50	Held in this name for convenience. Shares belong to Haymarket Trust.
Arthur L. Howard	34	
Arthur L. Howard	10	These 10 shares although in name of Arthur L. Howard, personally, are held by him as trustee u/w of Margaret D. Carter.
Arthur L. Howard, Trustee under deed from Edith Preston	15	
A. L. Howard et als. Trs. under will John O. Sargent	40	
A. L. Howard et al., Trs. under deed from Georgiana W. Sargent	45	
G. M. Amerige, Tr. The Frederick E. Weber Charities Corporation	250	
Mabel C. Alden	8	
Boston Y. M. C. A.	28	
Jennie W. Bliss	8	
Helen L. Butterfield	8	
Costello C. Converse, Trustee under will of J. W. Converse	40	
Frederic Cunningham	5	
Francis Cunningham	5	
F. L. Dabney et al. Trustees under will Theodore Chase	100	
Nettie B. Dobbins	28	
Francis S. Eaton	50	
Andrew Fiske, Trustee under Will J. P. Cooke	25	
Robert H. Gardiner et als. as Trustee, Attorney & Treasurer	250	
Clemens Herschel	50	
Hill, Barlow & Homans	338	
Edward W. Hutchins, Trustee under will of W. S. Eaton	50	None of these shares belong to the firm but to various trusts and accounts and are held in this name for convenience.

Name.	No. of shares.
H. C. Lodge et als., Trustees under Eliz. C. James.	50
F. P. Nash et al., Trustees under will F. P. Nash	25
Mary P. C. Nash, Trustee under will B. H. Nash	25
New England Hospital for Women and Children	100
Anna T. Reynolds	50
William B. Rogers	50
Margaret R. Rotch	50
Leverett Saltonstall	62
Moses Williams, Jr. et al., Trs. under decl. of trust dated Jan. 25, 1912, filed with State Street Trust Co. . . .	36
State Street Trust Co. Trustee under will George H. Williams	24
Moorfield Storey et al., Trustee under will Joshua D. Ball	50
Charles I. Thayer	8
Edward K. Thayer	10
Florence A. M. Thayer	20
William H. Thayer	8
Horace P. Tobey	100
R. H. Dana, et al., Trustees Episcopal Theological School at Cambridge . .	50
W. E. Vaughan et al., Trustees under will of H. H. Atkins	70
Margaret White Waters	50
F. C. Welch et al., Trustees under will Edward I. Browne	100
Alice M. White	50
I. E. Williams et al., Trustees under will of Rebecca T. Reed	25
Elizabeth Winthrop	50

26

"Treasury Department.

Washington, April 28, 1920.

Messrs. Dunbar, Nutter & McClennen, 161 Devonshire Street, Boston,
Massachusetts.

GENTLEMEN:

Re Haymarket Trust.

Your claims for the refunding of \$106.25 and \$432.00, capital
stock tax for the taxable periods ended June 30, 1917, June 30, 1918,
June 30, 1919, and for the taxable period ending June 30, 1920,
have been considered.

Your contention that the Haymarket Trust is not an 'association' within the meaning of Section 407 of the Revenue Act of 1916, and Section 1000 of the Revenue Act of 1918, is carefully noted. Upon consideration of all the facts this office holds that there is reserve to the shareholders of the Haymarket Trust such powers as to enable them to control the administration of the trust, and it is, therefore, an 'association' subject to the tax within the meaning of the Statute referred to above. Your claims are hereby rejected in full."

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.

2. That upon the law judgment should be for the defendant.

3. That upon the law and facts judgment should be for the defendant.

4. That the burden of proof is on the plaintiffs.

5. That the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

7. That the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

The court made and filed the following memorandum of decision:

"Upon these facts I find and rule, for reasons stated in my opinion in Hecht v. Malley, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

"I give such of the requests for rulings and findings as are contained in or are consistent with the foregoing findings of fact and memorandum of decision including as part thereof the opinion in Hecht v. Malley just referred to; the others I refuse. Judgment for the Plaintiffs."

The opinion in Hecht v. Malley referred to in the foregoing memorandum of decision is as follows:

"This case raises the question whether Massachusetts Trusts are subject to the tax on capital stock imposed by the Acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

"A Massachusetts Trust is a peculiar form of business organization common in this State, which has frequently been considered in different aspects in the United States Supreme Court and in the Mass-

Massachusetts Supreme Judicial Court.* In outline, it is an arrangement whereby property is conveyed to trustees who execute a declaration of trust to hold and manage it for the benefit of such persons as from time to time shall own certificates which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate-holders. Sometimes these are little, if any, greater than those of cestuis que trust under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations in which the certificate-holders meet annually, elect the trustees annually, and have power to direct the trustees, as well as to remove them. The Massachusetts decisions classify these trusts as being either 'strict trusts', or partnerships; the former class comprising those in which the certificate-holders have substantially the same rights as cestuis under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have entrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute, and in neither do the Massachusetts Courts recognize any entity apart from the persons of the trustees, or of the certificate-holders.

"The taxes here in question were levied under the Revenue Acts of 1916 (Sec. 407, Title IV, Act of Sept. 8, 1916) and 1918 (Sec. 1000 et seq.) The Act of 1916 provides that 'Every corporation, joint stock company, or association now or hereafter organized in the United States for profit and having a capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States, or any State or Territory of the United States shall pay annually' &c. The Act of 1918 provides (Title X, Sec. 1000) that 'in lieu of the tax imposed by the first subdivision of Sec. 407 of the Rev. Act of 1916' * * * 'Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock * * * as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.' On the face of this section the Hecht Trust was not within it.

The tax was imposed because of the defining section of the Act of 1918 which provides, 'The term 'corporation' includes associations, joint stock companies and insurance companies; the term 'domestic' when applied to a corporation or partnership means created or organized in the United States.'

"The Treasury Department held that the Hecht Real Estate Trust was an 'association' and therefore taxable as a corporation. It is not

*Elliot v. Freeman, 220 U. S. 178; Crocker v. Malley, 249 U. S. 223; Malley v. Bowditch, 250 F. R. 809 (C. C. A. 1st Cir.); Williams v. Milton, 215 Mass. 1; Dana v. Treasurer, 227 Mass. 563; Gleason v. McKay, 134 Mass. 419; Frost v. Thompson, 218 Mass. 300.

contended by the Government that the Trust was a 'joint stock company or an insurance company,' within the defining section quoted. Under the Treasury Regulations (Art. 7) some trusts are taxed under this statute, while others are not; trusts the members of which have all the liability of partners (see *Horgan v. Morgan*, 233 Mass. 381) are taxed as corporations; and the members may perhaps also be liable to taxation as partners. The underlying principle on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to create an organization distinct from the members who compose it. This was the point of view taken by *Jessel, M. R.*, in *Smith v. Anderson*, 15 Chancery Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c. 15 Chancery Div. 273).

"The tax in question began with the Act of 1909, which imposed on 'every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company' a tax based on its net income. It was challenged as being an income tax and as such at that time unconstitutional; but it was sustained on the ground that it was not an income tax, but an excise tax. *Flint v. Stone Tracy Co.*, 220 U. S.

107. And it was also held in *Eliot v. Freeman*, 220 U. S. 178, 30 that Massachusetts Trusts were not subject to it, i. e., that they were neither joint stock companies or associations within its meaning. The tax of 1909 was in substance continued in the Act of 1916. But as that statute imposed a general income tax on corporations, it was recast and was based on capital stock. The tax imposed by the Act of 1916 is by express language continued by the Act of 1918, and the provisions of the former Act are, with some modifications, retained in the later one.

"Decisions under the earlier acts are obviously of much importance in determining the meaning and scope of this one. *Eliot v. Freeman*, 220 U. S. 178, establishes that the Act of 1909 imposed an excise tax on the privilege of doing business in corporate or 'quasi-corporate' (220 U. S. 151) form, i. e., in forms not recognized by common law which possess special advantages conferred by statute; and that Massachusetts Trusts are not such organizations. In *Crocker v. Malley*, 249 U. S. 223, such a trust was held not to be an 'association' the income of which was taxable under the income-tax Act of 1913. The radical differences between a Massachusetts Trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

"It is clear, I think, from the background and history of this tax and the decisions which I have referred to, that it is essentially an excise tax imposed on the privilege of doing business in corporate or 'quasi-corporate' form. The word 'association' is to be construed in the light of this general purpose and scope. The use in statutes and contracts of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general

idea conveyed by the other words used in the same connection,—
‘noscitur a sociis.’ Both the other kinds of organization
31 mentioned are characterized by important and distinctive
powers derived from statutes. ‘Association’ was intended to
bring under the tax all business organizations which resemble cor-
porations and joint stock companies in that they invoke special statu-
tory powers in their organization. It was probably inserted out of
abundant caution in order that no such organization should escape.
It ought not to be so construed as to change the basic character of the
tax imposed; and I do not think that the omission of the words
‘organized’ etc. in the current statute, which has been urged in
argument for the defendant, was intended to have that effect. The
fact is that a Massachusetts Trust is fundamentally different from a
corporation and is not within a statute dealing with corporations and
similar organizations unless expressly specified. The persons inter-
ested are taxable as partners if the trust be of that character; other-
wise as trustees and beneficiaries of a ‘strict’ trust.

“The statute under consideration in *Crocker v. Malley*, supra, taxed
the income accruing ‘to every corporation, joint stock company, or
association and every insurance company organized in the United
States, no matter how created or organized, not including partner-
ships.’ If the words ‘no matter how created or organized’ be re-
garded as applying to ‘associations’,—as the Court assumed in its
opinion,—it is hard to discover any substantial distinction between
the scope of that statute and the one here in question as far as ‘as-
sociations’ are concerned; and that decision seems to be nearly con-
clusive of the present case.

“The detailed provisions of the statute tend to support this con-
clusion. They make ‘capital stock’ the basis of assessment. Most
corporations and certain kinds of joint-stock companies have a stated
capital, so carried on the books and divided into shares. Many
Massachusetts Trusts have nothing of that sort, being in this respect
like a testamentary trust. The trustees are charged with the prop-
erty which comes into their hands, and the shares represent

32 an aliquot part of it and of the income which it produces.

There is no special fund designated as capital stock. The
taxes here in question were assessed upon the entire net assets of the
trust; and it is contended by the Government that ‘capital stock’
should be so interpreted. But in the very next section to that under
which the tax is levied the Act refers to ‘invested capital’, and taxes
foreign corporations on that basis. The distinction between ‘capital
stock’ and ‘invested capital’ is there recognized in the Act itself.
The section also provides that ‘in estimating the value of capital
stock the surplus and undivided profits shall be included’,—which is
only applicable to organizations in which there is a capital fund dis-
tinct in bookkeeping from the other assets. Such a fund is required
in the accounts of the ordinary corporation and many joint-stock
companies; it is not required of a trust, although some of them do
carry such an account.

“The only other question is whether the tax paid on July 26,
1919, amounting to \$1,193, cannot be recovered because it does not

explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment; or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the Collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. (See *Atchison, & Ry. v. O'Connor*, 223 U. S. 280.)

"Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed with interest.

"I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse."

To the refusal of the court to make the several rulings as requested, the defendant duly excepted.

And the defendant, being aggrieved by said refusals to rule as requested, files this, his bill of exceptions, and prays that it may be allowed.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

March 4, 1922. Exceptions allowed.

J. M. MORTON, JR.,
U. S. D. J.

We hereby assent to the form of the within bill of exceptions.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

Finding of Facts and Memorandum of Decision.

[Filed December 3, 1921.]

MORTON, J.:

This is an action to recover back corporation excise taxes on capital stock assessed upon a Massachusetts trust.

I find the facts as follows:—

[MEMORANDUM.—Finding of facts and memorandum of decision are here omitted as they already appear of record being incorporated in the defendant's bill of exceptions and will be found printed on pages 10 et seq. of this Transcript of Record. James S. Allen, Clerk.]

An Agreement and Declaration of Trust, made by the subscribers hereto this tenth day of October, A. D. 1900, for the purpose of purchasing, improving and holding certain real estate situated in the city of Boston, county of Suffolk and Commonwealth of Massachusetts, bounded by Canal, Travers, Friend and Market Streets.

1. The trustees under this agreement are John D. Bryant, of Boston, and Frank E. Sweetser, of Brookline, both in the Commonwealth of Massachusetts, but the term "the trustees" hereinafter used shall mean the trustees or trustee hereunder for the time being, whether original or substituted, and the title of the trustees shall be "Trustees of the Haymarket Trust."

The term "shareholder" used in this agreement shall mean shareholder of record of a receipt or certificate from the trustees hereunder.

2. The trustees under this agreement are authorized as such trustees to purchase at their discretion any or all of the estates within the limits above described, together with any existing leases thereon, and to improve the estates so purchased as in their judgment they may deem wise, by the erection thereon of such buildings as in their judgment are suitable for business carried on in the locality in which the above-described property is situated, and to these ends as such trustees to make all necessary contracts and agreements for such purchases and for such new buildings.

They may also enter into, execute and deliver from time to time such agreements or conveyances as they may deem expedient or advisable for straightening or altering boundary lines; and may, for the better adjustment of boundary lines, in their discretion acquire adjoining land and buildings, and may for that purpose likewise sell and convey portions of the trust property.

35 The trustees shall take charge of and manage the property from time to time held by them under this agreement as they shall deem for the best interests of the shareholders.

Said trustees may make a lease or leases of the property held by them hereunder, or any part thereof, from time to time, upon such terms as they may deem best.

They shall also have power to represent the shareholders in all suits or legal proceedings in any courts of law or equity or before other bodies or tribunals, to employ counsel and to commence suits or proceedings or to compromise or submit to arbitration all matters of dispute to which the trust or the trustees may be a party, when, in their judgment, necessary or proper.

Except as above or hereinafter restricted, they shall have, as such trustees, the sole ownership, control, power of sale, leasing, letting and

exclusive management of all the property at any time held by them under the terms of this trust.

3. They shall have, as such trustees and for any purpose of the trust, full power at any time to mortgage with power of sale, or to issue bonds secured by a mortgage or mortgages with power of sale, upon the whole or any part of the premises and trust property upon such terms and for such time as they may deem best, but at no one time shall the total amount of mortgages against the trust property exceed the sum of five hundred thousand dollars; and they shall, as such trustees, have full power to issue, at their discretion, for the purpose of purchasing or improving the real estate hereinbefore designated, or for retiring any existing mortgages or for any other of the purposes of the trust, in accordance with the terms herein expressed, shares of the par value of one hundred (100) dollars each to an amount which shall not exceed one million (1,000,000) dollars, said shares to be sold for cash at not less than par, giving preference upon such terms and conditions as they shall deem best to existing shareholders.

They shall have power to borrow money for temporary exigencies and to give their notes as trustees therefor and to bind the trust thereby, but they shall not owe at any one time for such temporary exigencies more than fifty thousand (50,000) dollars, unless especially authorized thereto by vote of a majority of the shareholders at a regular annual meeting or at a special meeting duly notified therefor.

4. They shall have power to invest any surplus, contingent fund or sinking fund, and temporarily any other money of the trust in their hands, in such personal property as they approve, including the right to purchase any shares of this trust that may be offered them at a price which they deem satisfactory, and to sell and transfer any property so acquired at the discretion of the trustees.

5. They shall pay the necessary expenses of the management of the trust, employ such officers, brokers, architects, engineers, builders, agents (including agents for procuring subscriptions to this agreement) or other persons, as they think best, fix their compensation and define their duties; and the trustees shall receive in full, as their compensation for services, five per cent. per annum upon the gross amounts of income collected by them, and also a reasonable compensation for their services rendered during periods of construction of new buildings.

During periods of construction, interest at the rate of four per cent. per annum on the amount of new stock sold for the purpose of such construction shall be added to the cost of the buildings and paid semi-annually to purchasers of said stock from the date of their respective payments of subscriptions until the substantial completion of said buildings. All taxes, betterments and assessments levied during the construction of said buildings shall be added to the cost. The cost of said buildings shall be added to the cost. The cost of

aid buildings shall also include the compensation of the trustees during construction.

6. The shareholders hereunder shall not be liable for any assessment and the trustees shall have no power to bind the shareholders personally. In every written contract they may make, reference shall be made to this declaration of trust.

37 The person or corporation contracting with the trustees, as well as any beneficiary hereunder, shall look to the funds and property of the trust for the payment under such contract, or for the payment of any debt, mortgage, judgment or decree, or of any money that may otherwise become due or payable on account of the trust or by reason of the failure on the part of said trustees to perform such contract or any other obligation arising under this instrument, in whole or in part, and neither the trustees nor shareholders, present or future, shall be personally liable therefor.

7. No bond or surety or sureties shall ever be required of any trustee acting hereunder, and each trustee shall be liable only for his own acts, and then only for wilful breach of trust.

No purchaser, mortgagee, lessee or other person shall be bound to see to the application of any money paid by him to the trustees.

8. The trustees shall give receipts for instalments on subscriptions when paid, and, on the payment of the last instalment, shall issue certificates to the shareholders, in exchange for such receipts, in shares of one hundred dollars each for each one hundred dollars paid.

In case any subscriber neglects for twenty days after notice from the trustees to pay any instalment required by the trustees, the amount of his subscription then unpaid may be cancelled by the trustees, who may accept another subscriber in his place, and payments already made shall be forfeited.

Such receipts and certificates shall be transferable only on the books of the trustees upon surrender thereof, all instalments due having first been paid, and the acceptance of a receipt or certificate shall make the person named therein a party to this agreement.

The stock transfer books kept by the trustees shall at all reasonable times be open to the inspection of the shareholders.

38 9. The trustees shall pay to the shareholders such dividends from the net income as they may, from time to time, deem expedient; provided, however, that while any mortgage exists on said premises, no dividends shall be paid in excess of five per cent. per annum upon the total amount of capital in any one calendar year, it being intended and hereby prescribed that any excess of income over expenses and dividends at said rate shall be laid aside as a sinking fund, and be ultimately applied in reduction and payment of said mortgage or mortgages.

10. The trustees shall call meetings of the shareholders, until otherwise voted by the shareholders, annually on the second Wednesday of December, and shall report their receipts and expenses for the year ending on the thirtieth day of November preceding. They

may call special meetings of the shareholders at any time, and shall do so upon written request of the holders of one-twentieth of the shares outstanding. Notices of meetings shall be given seven days beforehand, and may be given by advertisement for three successive days in two daily papers published in said Boston, or by mail, at the option of the trustees. In notices of special meetings the purpose thereof shall be stated. Notices of meetings or calls for payments of subscriptions or for any other purpose shall be deemed binding upon each subscriber or shareholder, if mailed postage prepaid to the address last given by him to the trustees or, in default thereof, to his last known place of business or abode.

At any annual meeting, or special meeting called for the purpose, the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may depose any or all of the trustees and elect others in their places, may authorize the sale of the property, or any part thereof, held by the said trustees, and may alter or amend this agreement. For all other purposes a majority of those shareholders may decide on matters properly coming before them. Shareholders may vote by proxy, and for the purpose of voting at meetings each share shall be entitled to
39 one vote. At any meeting five shareholders, or their proxies, representing one-fifth of all the shares outstanding, shall constitute a quorum.

A certificate signed by the chairman of any meeting, countersigned by one or more of the trustees, shall be conclusive evidence of the regularity of that meeting and of any vote passed at such meeting and of all facts stated in such vote or certificate.

11. No alteration or amendment of this agreement nor change of trustee or trustees shall affect any person not having actual notice thereof until recorded in the Registry of Deeds for Suffolk County, Massachusetts; nor shall any such alteration or amendment or other action affect previously-acquired rights of any third person. Any trustee may by written instrument, acknowledged and recorded, resign his office.

12. Any vacancy in the number of trustees, caused otherwise than by the removal by the shareholders, may be filled by the remaining trustee until the next annual meeting of the shareholders, or until a special meeting called for the purpose of filling such vacancy, and until such vacancy be filled. In case of removal by the shareholders, the vacancy shall be filled by the shareholders.

The acting trustee or trustees from time to time shall have all the powers of original trustees, and, in case of any vacancy, the remaining trustee shall have and exercise all the powers of both trustees until such vacancy be filled. Upon resignation, decease, incapacity or removal or vacancy for any cause, the title of the outgoing trustee shall vest in the remaining trustee; and, upon the filling of any vacancy by the shareholders, or otherwise, as aforesaid, the title of the whole trust property shall vest in the new trustees jointly.

13. Any certificate or paper signed by the trustees, or by any of them, or by the shareholders, or a copy of the record of any of their

proceedings certified to by any one of the trustees, which it may be deemed desirable to record in the Registry of Deeds for the county of Suffolk, may be acknowledged by any one of the trustees or parties signing in the manner from time to time prescribed by law for the acknowledgment of deeds in Massachusetts.

14. This trust shall continue for twenty years after the death of the last surviving original subscriber hereto, and of Hamilton Hill, son of Hamilton A. Hill, late of Boston; Richard De Blois Boardman, son of Edwin A. Boardman, late of Boston; John Anderson Sweetser and Homer Loring Sweetser, both sons of Frank E. Sweetser, of Brookline; Adams S. Hill, son of Arthur D. Hill, of Boston; and Charles S. Howard, son of Arthur L. Howard, of Boston, unless the same shall be sooner terminated by the acts of the trustees or shareholders. Upon the termination of the trust by the expiration of time or for any other cause, the trustees shall sell the trust property and divide the net proceeds among the shareholders, in proportion to their respective interests.

15. We, the subscribers hereto, agree to pay to the trustees the amounts set against our names, in such sums and at such times as the trustees may require, within twenty days after notice, but no subscription shall be binding until the total amount of \$250,000 is subscribed; and we, John D. Bryant and Frank E. Sweetser, herein nominated to be trustees, hereby signify our acceptance of the trusts hereinbefore set forth.

Any subscription to any duplicate of this instrument shall be of the same force as if made upon the original hereof, and the original Trust Agreement and Declaration of Trust and any duplicates thereof, bearing original signatures, shall remain in the custody of the trustees, as part of the property of the trust, and shall be open to the inspection of any subscriber or shareholder, upon reasonable notice and call therefor.

In witness whereof, we, the said subscribers and said trustees, hereto set our hands and common seal, each adopting the seal hereto affixed, on the day and year first above written.

JOHN D. BRYANT,
FRANK A. SWEETSER,
Trustees.

	Name.	Amount.
(Signed)	JOHN D. BRYANT.....	\$25,000
"	F. E. SWEETSER.....	15,000
"	MRS. PETER C. BROOKS.....	15,000
"	RICHARD H. DANA, WILLIAM C. ENDICOTT, AND ROBERT TREAT PAINE, <i>For Episcopal Theological Seminary</i>	5,000
"	ROBERT H. GARDINER, <i>Trustee for Various Trusts</i>	20,000

	Name.	Amount.
"	HERBERT NASH & CHARLES I. THAYER, <i>Trustees</i>	7,000
"	GEORGE A. GODDARD, NEW ENGLAND HOSPITAL FOR WOMEN & CHILDREN	10,000
"	L. G. DU BOIS.....	5,000
"	W. D. SOHIER & JOSHUA LOVETT, <i>Trustees</i>	5,000
"	GERARD C. TOBEY & MOORFIELD STOREY, <i>Trustees</i>	15,000
"	C. C. CONVERSE.....	4,000
"	CLEMENS HERSCHEL	5,000
"	JOHN C. HAYNES & CHARLES R. CODMAN, <i>Trustees of Mass. Homoeopathic Hospital</i>	10,000
"	A. M. CURTIS.....	3,000
"	WILLIAM S. EATON.....	10,000
"	T. H. RUSSELL & RICHARD OLNEY, <i>Trustees</i>	3,000
"	A. LAWRENCE ROTCH.....	5,000
"	AUGUSTUS E. SCOTT, <i>Trustee</i>	5,000
"	E. A. NEWELL.....	10,000
"	ELLIOT C. LEE.....	5,000
"	F. W. LEE.....	5,000
"	STANLEY CUNNINGHAM	1,000
"	EDWARD I. BROWNE, <i>Trustee & Atty.</i>	15,000
42	GRANT WALKER	10,000
"	F. W. REYNOLDS.....	5,000
"	LEWIS S. DABNEY.....	10,000
"	W. W. VAUGHAN & LAURENCE MINOT, <i>Trustees</i>	7,000
"	WILLIAM B. ROGERS.....	5,000
"	FRANCIS PEABODY, JR.....	10,000
		<hr/> \$250,000

[MEMORANDUM.—Exhibits attached are here omitted as they appear as part of defendant's bill of exceptions. James S. Allen, Clerk.]

Defendant's Petition for Writ of Error.

[Filed March 21, 1922.]

Now comes John F. Malley, defendant in the above entitled cause, and says that on or about the thirteenth day of March, 1922, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Allowed.

J. M. MORTON, JR.,
U. S. D. J.

43

Defendant's Assignment of Errors.

[Filed March 21, 1922.]

Now comes the defendant in the above entitled cause who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.
2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.
3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.
4. That the court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.
5. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.
7. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

- 44 8. That the court erred in finding and ruling that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

ROBERT O. HARRIS,
United States Attorney.
 FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Arthur L. Howard, of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket Trust, so-called, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein John F. Malley, of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
U. S. District Judge.

45 & 46 *Acknowledgment of Service of Citation on Writ of Error.*

Service of the within citation is hereby accepted, March 27, 1922.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Defendant in Error.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled, No

1179, Law Docket, Arthur L. Howard et al., Trustees, Plaintiffs, v. John F. Malley, Former Collector of Internal Revenue, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Boston, in said District, this twenty-fifth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

47 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Arthur L. Howard, of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket Trust, co-called, plaintiffs, and Andrew J. Casey, of Newburyport, Massachusetts, with place of business at 306 Washington St., Boston, Mass., heretofore Acting Collector of Internal Revenue for the Third District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
48 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twentieth day of April next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES S. ALLEN,
*Clerk of the District Court of the
United States, District of Massachusetts.*

Allowed by
JAMES M. MORTON, JR.,
U. S. District Judge.

Return of District Court on Writ of Error.

District Court of the United States.

DISTRICT OF MASSACHUSETTS, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this twentieth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

49

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 1322 Law Docket.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs,

v.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant.

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of Andrew J. Casey of 10 Buck Street, Newburyport, Massachusetts, with place of business at 306 Washington Street, Boston, Massachusetts, in our District of Massachusetts, to the value of five hundred (500) dollars,

and to summon the said defendant (if he may be found in your district,) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September. Then and there, in our said court, to answer unto Arthur L. Howard of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as trustees of the Haymarket Trust, so-called, in an action of contract.

To the damage of the said plaintiffs (as they say) the sum of five hundred (500) dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, The Honorable James M. Morton, Jr., at Boston, the nineteenth day of August in the year of our Lord one thousand nine hundred and twenty.

JOHN E. GILMAN, JR.,
Deputy Clerk.

50

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, August 23, 1920.

Pursuant hereunto I have this day attached a chip as the property of Andrew J. Casey, and thereafter on the same day I summoned the within named Andrew J. Casey to appear at Court as herein directed by giving to him in hand at Boston in said District an original summons to this Writ.

PATRICK J. DUANE,
United States Marshal,
By ASA P. BARKER,
Deputy.

Fees:

Service	\$2.00
Travel06
	<hr/>
	\$2.06

This cause was duly entered at the September Term of this court, A. D. 1920, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 14, 1920, the following Declaration was filed:

Declaration.

[Filed September 14, 1920.]

Now come the plaintiffs and for cause of action say as follows:

1. The plaintiffs are and at all times since December 15, 1917, have been the trustees under a certain instrument or declaration of

trust dated October 10, 1900, a copy of which marked "A" is hereto annexed and made a part hereof.

2. Under the said declaration of trust dated October 10, 1900, the plaintiffs, as trustees as aforesaid, at all times since December 15, 1917, have owned certain real estate located on Canal and Friend Streets in the City of Boston in said Third District of Massachusetts numbered 82-98 Canal Street and 171-177 Friend Street, having a fair value in excess of ninety-nine thousand (\$99,000) dollars and they also have owned certain bonds having a fair value in excess of twenty thousand (\$20,000) dollars.

51 3. The Commissioner of Internal Revenue of the United States has required the plaintiffs to file certain returns on the form, numbered 707, prescribed by said Commissioner of Internal Revenue showing the fair market value of the property held by the plaintiffs as trustees as aforesaid under the said declaration of trust and further required that the said returns be prepared by the plaintiffs as if for a corporation, joint-stock company or association known as the Haymarket Trust, and thereupon, the plaintiffs, in accordance with the requirement of the said Commissioner of Internal Revenue, filed such returns with the Collector of Internal Revenue for the Third District of Massachusetts.

4. Thereafter the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1918, purported to assess capital stock taxes of one hundred sixty-eight and 50/100 (168.50) dollars additional for the year ending the thirtieth day of June, 1919; and one hundred eighty-nine (189) dollars for the year ending the thirtieth day of June, 1920, upon the plaintiffs as trustees as aforesaid.

5. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, joint-stock company or association within the meaning of the said Revenue Act of 1918 and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust in or to the income, rents, issues or profits under the terms, trusts or provisions of said instrument of October 10, 1900, constitute or ever have constituted a corporation, joint-stock company or association, or any other taxable body within the meaning of the said Revenue Act of 1918, and that the said returns were wrongly and unlawfully required of the plaintiffs and the said taxes assessed as aforesaid were wrongfully and unlawfully assessed.

6. Thereafter the said defendant as Acting Collector of Internal Revenue for the Third District of Massachusetts sent bills to
52 the plaintiffs for the capital stock taxes assessed as aforesaid and made demand upon the plaintiffs as trustees as aforesaid to pay the said taxes of one hundred sixty-eight and 50/100 (168.50) dollars and one hundred eighty-nine (189) dollars, and thereupon in compliance with said demand the plaintiffs as trustees as aforesaid on the twenty-seventh day of January, 1920, and the sixteenth

day of January, 1920, respectively, paid to the defendant as Acting Collector of Internal Revenue as aforesaid the said sums of one hundred sixty-eight and 50/100 (168.50) dollars and one hundred eighty-nine (189) dollars respectively, but under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said taxes and the demand made upon them by the defendant were both illegal; and that the payment was unlawfully required of them.

7. Thereafter the defendant in writing acknowledged the receipt of the said payment made under protest.

8. Thereafter the plaintiffs duly claimed that the moneys paid by them as aforesaid to the defendant be refunded, by application therefor in writing to the said Commissioner of Internal Revenue.

9. Thereafter the said claim for refund was denied by the Commissioner of Internal Revenue and notice of such denial was given to the plaintiffs by letter dated April 28, 1920.

10. And the plaintiffs say, by reason of the facts aforesaid, they are entitled to recover from the defendant the sums of one hundred sixty-eight and 50/100 (168.50) dollars and one hundred eighty-nine (189) dollars paid by them under protest to the defendant, with interest thereon from the twenty-seventh day of January, 1920, and the sixteenth day of January, 1920, respectively.

By Their Attorneys, DUNBAR, NUTTER &
McCLENNEN.
ALFRED L. FISH.

53 [Memorandum.—The declaration of trust, marked "A" which is referred to as annexed, is here omitted as it is identical with the one attached to finding of facts in case No. 1179 Law, Arthur L. Howard et al., Trustees, v. John F. Malley, with the exception of the name of subscribers, and will be found printed on page 34 of this Transcript of Record. James S. Allen, Clerk.]

At the same term, to wit, September 15, 1920, the following Answer was filed:

Answer.

[Filed September 15, 1920.]

Now comes the defendant in the above entitled action and for answer denies each and every material allegation, item, count and particular in the plaintiff's writ and declaration contained.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.

Also, at the same term, to wit, November 16, 1920, the following Waiver of Jury Trial was filed:

Waiver of Jury Trial.

[Filed November 16, 1920.]

Now come the parties in the above entitled action and waive right of jury trial.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.
ALFRED L. FISH,
DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

54 This cause was thence continued to the December Term, A. D. 1920, when, to wit, December 29, 1920, this cause came on to be heard by the court, without a jury, with the cause entitled "No. 1179 Law Docket, Arthur L. Howard et al., Trustee, v. John F. Malley, Former Collector of Internal Revenue."

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, finding of facts and memorandum of decision was filed.

This cause was thence continued to the present December Term, A. D. 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant within extended time and is allowed by the court on March 4, 1922.

On the fourteenth day of March, A. D. 1922, the following Agreement for Judgment is filed:

Agreement for Judgment.

[Filed March 14, 1922.]

It is hereby mutually agreed that judgment for the plaintiffs may be entered forthwith upon the findings of the court as of this thirteenth day of March, 1922, in the sum of \$357.50 damages with interest on the amounts included therein from the respective dates of payment in the sum of \$45.86 and their costs of suit taxed at \$—.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Plaintiffs.
ROBERT O. HARRIS,
United States Attorney,
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Thereupon, to wit, March 14, 1922, it is considered by the court that the said Arthur L. Howard and Robert S. Barlow, Trustees, plaintiffs, recover from said Andrew J. Casey, Acting Collector, defendant, on the finding of the court, the sum of four hundred and three dollars and thirty-six cents (\$403.36) damages, and their costs of suit taxed at —.

Defendant's Bill of Exceptions.

[Filed February 1, 1922; Allowed March 4, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of the Haymarket Trust to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed and paid under the requirements of Section 1000 of the Revenue Act of 1918, approved February 24, 1919 (40 Stat., 1057). The plaintiffs' declaration alleges in substance that the Haymarket Trust is not an association subject to said taxes within the meaning of said Act. The defendant's answer is a general denial. All the material facts of the case are contained.

(1) In the agreement and declaration of trust which was annexed to and made a part of the plaintiffs' declaration and which is incorporated in this bill of exceptions by reference;

(2) In the findings of facts made by the court and the copies of records and documents referred to therein as "attached hereto" and filed in this case.

This case was tried before Judge Morton, without a jury, who made and filed certain findings of facts. Said findings of facts, together with copies of records and documents referred to therein as "attached hereto," are as follows:

[MEMORANDUM.—By direction of counsel, finding of facts is here omitted as certain paragraphs are identical with finding of facts as printed as part of bill of exceptions in case No. 1179 Law, Howard et al., Trustees, v. Malley. James S. Allen, Clerk.]

"Thereafter, on or about January 1, 1920, said Commissioner, claiming to act under the Revenue Act of 1918, assessed the Haymarket Trust a capital stock tax of \$168.50 in addition to the capital stock tax paid prior thereto for the same taxable period, to wit: for the period beginning the first day of July, 1918, and ending the thirtieth day of June, 1919; and a capital stock tax of \$189.00 for the period beginning the first day of July, 1919, and ending the thirtieth day of June, 1920. Both of these assessments were made upon the basis of the information returned for the Haymarket Trust on Form 707 covering these periods.

"Thereafter, the defendant, Andrew J. Casey, as Acting Collector for the Third District of Massachusetts, sent notices to the Hay-

market Trust of the assessments of the capital stock taxes as aforesaid and made demand upon the Haymarket Trust to pay the said taxes, to wit: an additional tax of \$168.50 for the period from July 1, 1918 to June 30, 1919 (there having been paid to and collected by John F. Malley, Collector, prior thereto a tax of \$74.50 for this same period), and also sent notice of assessment, which notice is incorporated herein by reference, upon the Haymarket Trust of \$189.00 capital stock tax for the period from July 1, 1919, to June 30, 1920.

"Thereupon, in compliance with notice and demand, incorporated herein by reference, from the defendant collector, the plaintiffs, as 'trustees' under said agreement, on the sixteenth day of January, 1920, paid the defendant, as Acting Collector, \$189.00; and on the twenty-seventh day of January, 1920, paid the defendant \$168.50 under written protests, incorporated herein, made and delivered to the defendant at the time of the respective payments.

"Thereafter, the plaintiffs by an application therefor in writing, incorporated herein by reference, requested that the moneys paid by them as aforesaid to the defendant be refunded. Thereafter, said claim for refund was denied by the Commissioner of Internal Revenue and notice of said denial was given to the plaintiffs by a letter dated April 18, 1920, a copy of which letter is attached hereto.

"The said amounts of \$168.50 and \$189.00 have not been repaid to the plaintiffs."

57 The agreement and declaration of trust referred to as "attached hereto" is attached to the finding of facts in the case of Howard v. Malley, No. 1179, and reference is hereby made to that copy.

[MEMORANDUM.—Certain Exhibits are here omitted as they form part of the bill of exceptions in No. 1179 Law, Howard et al. v. John F. Malley, and will be found printed on page 17 of this Transcript of Record. James S. Allen, Clerk.]

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.
2. That upon the law judgment should be for the defendant.
3. That upon the law and facts judgment should be for the defendant.
4. That the burden of proof is on the plaintiffs.
5. That the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

7. That the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1919.

8. That the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

9. That the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

The court made and filed the following memorandum of decision:

58 "Upon these facts I find and rule, for reasons stated in my opinion in *Hecht v. Malley*, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

I give such of the requests for rulings and findings as are contained in or are consistent with the foregoing findings of fact and memorandum of decision including as part thereof the opinion in *Hecht v. Malley* just referred to; the others I refuse. Judgment for the plaintiffs."

The opinion in *Hecht v. Malley* referred to in the foregoing memorandum of decision is as follows:—

[MEMORANDUM.—The opinion in *Hecht v. Malley* is here omitted, as it already appears of record as part of bill of exceptions in case No. 1179 *Law, Arthur L. Howard et al., Trustees, v. John F. Malley. James S. Allen, Clerk.*]

To the refusal of the court to make the several rulings as requested, the defendant duly excepted.

And the defendant, being aggrieved by said refusals to rule as requested, files this his bill of exceptions, and prays that it may be allowed.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

March 4, 1922. Exceptions allowed.

J. M. MORTON, JR.,
U. S. D. J.

We hereby assent to the form of the within bill of exceptions.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

59 *Finding of Facts and Memorandum of Decision.*

[Filed December 3, 1921.]

MORTON, J.:

This is an action to recover back corporation excise taxes on capital stock assessed upon a Massachusetts trust.

I find the facts as follows:—

[MEMORANDUM.—Finding of facts is here omitted as it forms part of the defendant's bill of exceptions already printed in this case. James S. Allen, Clerk.]

The agreement and declaration of trust referred to as "attached hereto" is attached to the finding of facts in the case of Howard v. Malley, No. 1179, and reference is hereby made to that copy.

[MEMORANDUM.—Certain exhibits are here omitted as they form part of the bill of exceptions in No. 1179 Law, Howard et al. v. John F. Malley, and will be found printed on page 17 of this Transcript of Record. James S. Allen, Clerk.]

Memorandum of Decision.

Upon these facts I find and rule, for reasons stated in my opinion in Hecht v. Malley, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

I give such of the requests for rulings and findings as are contained in or are consistent with the foregoing findings of fact and memorandum of decision, including as part thereof the opinion in Hecht v. Malley just referred to; the others I refuse.

Judgment for the plaintiffs.

Defendant's Petition for Writ of Error.

[Filed March 21, 1922.]

Now comes Andrew J. Casey, defendant in the above entitled cause, and says that on or about the thirteenth day of March, 60 1922, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a

transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Allowed.

J. M. MORTON, JR.,
U. S. D. J.

Defendant's Assignment of Errors.

[Filed March 21, 1922.]

Now comes the defendant in the above entitled cause, who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.

2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.

3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.

61 4. The court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.

5. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

7. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust had capital stock and was carrying on and doing business during period prior to June 30, 1919.

8. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

9. That the court erred in its denial and refusal of the defendant's request for ruling that the Haymarket Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

10. That the court erred in finding and ruling that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

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Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Arthur L. Howard, of Cambridge, Massachusetts, and Robert S. Barlow, of Boston, Massachusetts, as Trustees of the Haymarket Trust, so-called, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein Andrew J. Casey, of Newburyport, Massachusetts, with place of business at 306 Washington St., Boston, Mass., heretofore Acting Collector of Internal Revenue for the Third District of Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
U. S. District Judge.

Acknowledgment of Service of Citation on Writ of Error.

Service of the within citation is hereby accepted, March 27, 1922.
DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Defendants in Error.

63 & 64

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled, No. 1322, Law Docket, Arthur L. Howard et al., Trustees, Plaintiffs, v. Andrew J. Casey, Acting Collector of Internal Revenue, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this twentieth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

65 & 66 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of Massachusetts.

Judgment in District Court (Morton, J.), March 14, 1922.

RECORD.

Robert O. Harris, United States Attorney; Frederic S. Harvey, Assistant U. S. Attorney, for Plaintiff in Error.

Edward S. McClennen, Dunbar, Nutter & McClennen, for Defendant in Error.

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United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of
the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition
of the judgment of a plea which is in the said District Court, before
you, between Louis Hecht, Junior, of Boston, Massachusetts, and
Simon E. Hecht, of Boston, Massachusetts, as Trustees of the Hecht
Real Estate Trust, so-called, plaintiffs, and John F. Malley, of 142
Fuller Street, Brookline, Massachusetts, with place of business at 15
State Street, Boston, Massachusetts, formerly Collector of Internal
Revenue, defendant, a manifest error hath happened, to the great
damage of the said defendant as by his complaint appears: We being
willing that error, if any hath been, should be duly corrected, and
full and speedy justice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that then under your
seal, distinctly and openly, you send the record and proceedings
aforesaid, with all things concerning the same, to the United
States Circuit Court of Appeals for the First Circuit, together
with this writ, so that you have the same at the city of Boston,
Massachusetts, on the twentieth day of April next, in the said Circuit
Court of Appeals, that, the record and proceedings aforesaid being
inspected, the said Circuit Court of Appeals may cause further to be
done therein to correct that error, what of right, and according to
the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the
United States, the twenty-fourth day of March, in the year of our
Lord one thousand nine hundred and twenty-two.

JAMES S. ALLEN,
*Clerk of the District Court of the
United States, District of Massachusetts.*

Allowed by
JAMES M. MORTON, JR.,
U. S. District Judge.

Return of District Court on Writ of Error.

DISTRICT OF MASSACHUSETTS, ss:

District Court of the United States.

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, James S. Allen, Clerk of the said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twentieth day of April A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

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TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 1226, Law Docket.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs,

v.

JOHN F. MALLEY, Former Collector of Internal Revenue, Defendant

Writ.

MASSACHUSETTS DISTRICT, ss:

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, formerly Collector of Internal Revenue, in our District of Massachusetts, to the value of four thousand (4,000) Dollars, and summon the said defendant (if he may be found in your District), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the fourth Tuesday of June then and there, in our said Court, to answer unto Louis Hecht, Junior, of Boston, Massachusetts, and Simon E. Hecht, of Boston, Massachusetts, as trustees of the Hecht Real Estate Trust, so-called.

In an action of Contract to the damage of the said plaintiffs (as they say) the sum of four thousand (4,000) Dollars, which shall

then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the seventeenth day of May in the year of our Lord one thousand nine hundred and twenty.

THOMAS A. GILLING,
Deputy Clerk.

72

Officer's Return of Service.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, May 19, 1920.

Pursuant hereto I have this day attached a chip as the property of the within-named John F. Malley, formerly Collector of Internal Revenue, and thereafter on the same day, I summoned the said John F. Malley to appear at Court and answer as herein directed by giving to him in hand at Boston in said District, an original summons to this writ.

PATRICK J. DUANE,
United States Marshal,
By BENJAMIN J. SCULLY,
Deputy.

Fees:

Service	\$2.00
Travel06
	<hr/>
	\$2.06

This cause was duly entered at the June Term of this court, A. D. 1920, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, June 23, 1920, a declaration was filed.

On the third day of July, A. D. 1920, an answer was filed.

At the same term, to wit, August 23, 1920, the following Motion to Substitute Declaration was filed and assented to:

Motion to Substitute Declaration.

[Filed August 23, 1920.]

Now come the plaintiffs in the above-entitled action and, by their attorneys, ask leave to substitute the attached declaration in lieu of the declaration heretofore filed in this same cause of action.

DUNBAR, NUTTER & McCLENNEN,

Attorneys for the Plaintiffs,

By ALFRED F. FISH.

Assent to the above motion is hereby given on behalf of the defendant.

ALONZO H. GARCELON.
Special Assistant U. S. Attorney.

73 Thereupon, on the same day, the following Substituted Declaration was filed:

Substituted Declaration.

[Filed August 23, 1920.]

Now come the plaintiffs and for cause of action say as follows:

1. The plaintiffs are and have been—Louis Hecht, Jr., since 1903, and Simon Hecht since July, 1919,—trustees under a certain instrument or declaration of trust dated April 1, 1899, a copy of which marked "A" is hereunto annexed and made a part hereof.

2. The defendant, John F. Malley, prior to January 1, 1917, and at all times thereafter until September 30, 1919, was the Collector of Internal Revenue for the Third District of Massachusetts.

3. Under the said declaration of trust dated April 1, 1899, the plaintiffs, Louis Hecht, Jr., since 1903, and Simon Hecht since July, 1919, as trustees thereunder, at all times have owned certain real estate located on Federal Street and on Atlantic Avenue, respectively, having a fair value in excess of ninety-nine thousand dollars (\$99,000).

4. The Commissioner of Internal Revenue of the United States required the plaintiff Louis Hecht, Jr., to file a certain return on a form numbered 707 prescribed by said Commissioner of Internal Revenue under the Revenue Act of 1916, showing the fair market value of the property held by the plaintiff as trustee as aforesaid under the said declaration of trust, and further required that the said return be prepared by the said plaintiff as if for a corporation, joint stock company or association known as the Hecht Real Estate Trust, and thereupon the said plaintiff, in accordance with the requirements of the said Commissioner of Internal Revenue, filed such a return with the defendant as Collector of Internal Revenue for the Third District of Massachusetts.

5. Thereafter the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1916, purported to assess a capital stock tax upon the said plaintiff as trustee as aforesaid, and upon the said Hecht Real Estate Trust, of three hundred

74 (6) months ending the thirtieth day of June, 1917, and a tax of six hundred fifty dollars and fifty cents (\$650.50) for the year ending the thirtieth day of June, 1918.

6. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, joint stock company

or association within the meaning of the said Revenue Act of 1916, and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust, or in or to the income, rents, issue or profits under the terms, trusts or provisions of said instrument of April 1, 1899, constitute or ever have constituted a corporation, joint stock company or association, or any other taxable body within the meaning of the said Revenue Act of 1916, and that the said return was wrongfully and unlawfully required of the plaintiffs and the said tax assessed as aforesaid was wrongfully and unlawfully assessed.

7. On or about December 31, 1918, the said defendant as Collector of Internal Revenue for the Third District of Massachusetts sent a bill to the plaintiff Louis Hecht, Jr., for the capital stock taxes assessed as aforesaid and made demand upon the said plaintiff as trustee as aforesaid to pay the said taxes of \$325.25 and \$650.50, respectively. In compliance with said demand, the said plaintiff as trustee as aforesaid on the ninth day of January, 1919, paid to the defendant as Collector of Internal Revenue as aforesaid the said respective sums of \$325.25 and \$650.50, but under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said taxes and the demand made upon him by the defendant were both illegal and that the payment was unlawfully required of him.

8. Thereafter, on or about the ninth day of January, 1919, the defendant in writing acknowledged the receipt of the said payments made under protest.

9. Furthermore, the said Commissioner of Internal Revenue, claiming to act under the Revenue Act of 1918, has purported to assess a capital stock tax upon the plaintiffs as trustees as aforesaid, and upon the said Hecht Real Estate Trust of six hundred
75 and fifty-seven and 50/100 dollars (\$657.50) for the year ending June 30, 1919, and a tax of eleven hundred ninety-three (1,193) dollars for the year ending the thirtieth day of June, 1920.

10. The plaintiffs are advised that the said declaration of trust did not create, organize or establish a corporation, association or joint stock company within the meaning of the said Revenue Act of 1918, and that neither the said trustees nor cestuis que trustent, nor any group of persons having any right, title or interest in or to the property held under said declaration of trust, or in or to the income, rents, issue or profits under the terms, trusts or provisions of said instrument of April 1, 1899, constitute or ever have constituted a corporation, association or joint stock company, or any other taxable body within the meaning of the said Revenue Act of 1918, and that the said return was wrongfully and unlawfully required of the plaintiffs and the said taxes assessed as aforesaid were wrongfully and unlawfully assessed.

11. Demand for payment of the taxes so assessed has been made as follows: For the year ending June 30, 1919, \$657.50 demanded on

or about February 1, 1919; for the year ending June 30, 1920, \$1,193 demanded on or about July 16, 1919.

And in compliance with said demand, the said Louis Hecht, Jr., as trustee as aforesaid, on the tenth day of February, 1919, paid to the defendant as Collector of Internal Revenue the sum of \$657.50; and the said plaintiffs as trustees as aforesaid on the twenty-sixth day of July, 1919, paid \$1,193 to the defendant as Collector of Internal Revenue.

All of said payments were had under written protest made and delivered to the said defendant at the time of said payment that the assessment of the said taxes and the demand made upon Louis Hecht, Jr., as trustee and the plaintiffs as trustees, respectively, by the defendant were illegal and that the payment was unlawfully required of them.

12. In due time thereafter the defendant in writing acknowledged the receipt of each of the said payments made under protest.

13. Thereafter the plaintiffs duly claimed that the moneys
76 paid by them as aforesaid to the defendant be refunded, by application therefor in writing to the said Commissioner of Internal Revenue.

14. Thereafter, on or about the twenty-sixth day of April, 1920, the said claim for refund was denied by the Commissioner of Internal Revenue and notice of such denial was given to the plaintiffs by letter dated April 27, 1920.

15. The plaintiffs say by reason of the facts aforesaid they are entitled to recover from the defendant the following amounts: \$975.75 paid January 9, 1919, \$657.50 paid February 10, 1919, \$1,193 paid July 26, 1919, making a total of \$2,826.25 paid by them under protest to the defendant, with interest thereon from the respective dates of payment.

By Their Attorneys, DUNBAR, NUTTER & McCLENNEN.
ALFRED F. FISH.

A.

Hecht Real Estate Trust.

Whereas Jacob H. Hecht is the absolute owner of the record title to certain real estate situated in the City of Boston in the County of Suffolk and Commonwealth of Massachusetts, but holds the same for the benefit of the persons hereinafter named as shareholders in this trust, upon the trusts hereinafter set forth, said real estate being described as follows, to wit:

First. A certain parcel of land with the buildings thereon situated in said Boston and bounded and described as follows: Easterly by Federal Street one hundred and sixty-eight and 09/100 (168.09) feet; southerly by the land late of Thomas E. Proctor by two lines one hundred and ten and 46/100 (110.46) feet and forty-three 98/100 (43/98) feet respectively running through the middle of the brick

partition wall, said wall being a party wall; westerly by land now or late of the trustees under the will of Ebenezer Francis fifty-seven and 80/100 (57.80) feet; and again westerly by the end of Linwood Place, so-called twenty-one and twelve one-hundredths (21.12) feet; southerly by said Linwood Place 81/100 (.81) of a foot; westerly again by land now or late of N. W. Rice by a line through the middle of a wall, said wall being a party wall sixty-nine and 43/100 (69.43) feet; northerly by land now or late of said Rice 81/100 (.81) of a foot; westerly again by land supposed to be now or late of said Rice thirteen and 99/100 (13.99) feet; northerly again by land now or late of Conant and land now or late of Preston, and land now or late of Brown by two lines seventy-eight and 30/100 (78.30) feet and fifty-two and 45/100 (52.45) feet respectively; containing twenty-three thousand and ninety and 4/10 (23090.4) square feet more or less. Being the same premises conveyed to me by the following deeds to wit: Deed of Susan E. Taggard dated October 1st, 1885, recorded with Suffolk Deeds Book 1695, page 231; deed of Sarah H. Stratton, dated October 1st, 1895, recorded with said deeds Book 1695, page 230; deed of William T. Piper, dated October 1st, 1885, recorded with said deeds Book 1695, page 229; release of Bartholomew Taggard dated October 1st, 1885, recorded with said deeds, book 1695, page 232; deed of Nehemiah W. Rice, dated November 17, 1885, recorded with said deeds book 1702, page 362; deed of the City of Boston dated May 11, 1891, recorded with said deeds Book 1995, page 254; deed of Thomas F. Richardson dated October 29, 1892, recorded with said deeds Book 2092, page 503, except the strip of land about one (1) foot wide conveyed by me to Thomas E. Proctor by deed dated November 3, 1893, recorded with said deeds Book 2163, P. 1 to which reference is hereby made. The premises are shown on a plan by William H. Whitney dated May 23, 1893, to be recorded herewith.

Second. All the right, title, and interest which I acquired under a release from Bridget Roth dated November 6, 1885, and recorded with said deeds book 1909, page 232, to which release reference is hereby made.

Third. A certain parcel of land with the buildings thereon in said Boston containing about thirty-three thousand five hundred (33,500) square feet more or less, and bounded northwesterly by Atlantic Avenue (formerly Broad Street) there measuring one hundred and thirty and thirteen one-hundredths (130.13) feet; northeasterly by Fort Hill Wharf two hundred and ten (210) feet more or less; southeasterly by Harbor Commissioners line about one hundred and fifty-two (152) feet; and southwesterly by land and wharf now or late of John L. Batchelder two hundred and eighty-two (282) feet more or less, together with all the rights and estate belonging to the above described premises beyond said Harbor Commissioners' line, and all the right to the extension of the wharf. Also all rights to construct a wharf and erect buildings which were granted by license of the Harbor and Land Commissioners of the Commonwealth approved by the Governor and

Council bearing date August 1st, 1889, and recorded with an accompanying plan with said deeds, book 1895, page 49. Being the same premises conveyed to me by deed of Hubbard Breed dated April 9, 1896, and recorded with said deeds Book 2351, page 565.

Now therefore I the said Jacob H. Hecht hereby declare that said real estate above described is held by me, and I hereby for myself and my heirs, executors, and administrators, covenant severally with the persons hereinafter named as shareholders, and their respective heirs, executors, administrators, and assigns, to stand seized of said real estate upon the trusts, to the uses, for the purposes, and with the powers following, and none other, to wit:

First. This Trust shall be known as the Hecht Real Estate Trust, and shall continue until twenty (20) years after the death of the said Jacob H. Hecht unless sooner terminated as hereinafter provided.

Second. The word "trustee" in this instrument and any pronoun referring thereto shall mean the trustee or trustees for the time being hereunder unless clearly used with a different meaning.

Third. The trustees under this trust shall hold said real estate and the proceeds thereof, and all property from time to time held by him as such trustee to improve and dispose thereof for the benefit of the shareholders for the time being under this trust.

79 The number of shares in this trust shall be one thousand (1,000) now held by the following named persons, according to the number of shares set against their respective names, and said persons, and their respective executors, administrators, and assigns shall be the shareholders hereunder.

Said present shareholders and the shares held by them are—

Names.	No. of shares.
Jacob H. Hecht	200
Louis Hecht, Jr.....	200
Marcus H. Hecht	200
Blemma Hecht	100
Marcus H. Hecht, Blemma Hecht, Bert R. Hecht, trustees under the will of Isaac Hecht for the benefit of Helen Hecht, Florence H. Fries, Elsie S. Hecht and Bert R. Hecht and Summit L. Hecht.....	100
Amelia K. Hecht	100
Edith Hecht	25
Elias M. Hecht	25
Joel K. Hecht	25
Adelheid Hecht	25
	<hr/> 1,000

Fourth. The shares under this trust shall be personal property entitling the holders thereof to a division of profits, and to an

ultimate interest in the division of the proceeds of said property, according to the terms of this instrument. Said shareholders shall have no other interest in the trust property itself, whether real or personal, and no right to call for any partition thereof, or to exercise any control thereover, except as herein provided, and the death of any shareholder during the continuance of this trust shall not determine the trust, nor entitle the legal representatives of such deceased shareholder to an account or to any rights in the property or against the trustee, except as successor to the rights of such deceased shareholder, and pursuant to the terms of this instrument.

80 Fifth. The trustee shall issue to each shareholder one or more certificates showing his interest under this trust, and shall keep a record of all certificates so issued, in a book kept for the purpose. Such certificates shall be alike in form, signed by the trustee for the time being, shall bear reference to this trust, shall have endorsed a copy of Article Sixth of this instrument, and upon face thereof shall be in substantially the following form:

Commonwealth of Massachusetts.

Certificate No. —.

Shares.

Hecht Real Estate Trust. 1,000 Shares.

This certifies that — is the holder of — shares in the Hecht Real Estate Trust, subject to the declaration of trust dated —, —, recorded with Suffolk County (Mass.) Deeds Book — page —. This certificate is transferable only on the books of the trustee in person or by attorney upon the surrender of this certificate, and subject to the provisions endorsed thereon.

In witness whereof the trustee of said trust has hereunto set his hand this — day of —, A. D. —.

—, Trustee.

Countersigned:

—, Transfer Agent.

Sixth. The shares in this trust shall be transferable only upon the books of the trustee to be kept by a transfer agent to be appointed by him, and by instrument in writing executed by the shareholder or his duly authorized agent. Any shareholder, if desirous of selling or transferring any of his shares, except to a person then a shareholder, or to a lineal descendant of Elias Hecht, or to the husband or wife or widower or widow of such descendant, and the executor or administrator of any deceased shareholder, if desirous of selling, except as aforesaid, any share or shares belonging to the estate of such deceased shareholder, or of transferring the same, except to a legatee, or to the persons entitled to distributive shares in case of intestacy, and the grantee or assignee of any share

or shares taken or sold by process of law, or by foreclosure of any pledge or hypothecation, if desirous of selling any share or shares, except as aforesaid, shall first notify the trustee of such desire. The

trustee shall then select one beneficiary as an appraiser, and
81 the person desirous of selling shall select another beneficiary as an appraiser, and these two shall select a third, who need not be a beneficiary. The three so appointed shall appraise the shares proposed to be sold, and the majority of them shall have the power to determine their value. The trustee shall thereupon, unless the shares be withdrawn from sale, have the option for thirty days of purchasing said shares for said trust estate at the appraised value, or of placing them with such person or persons as may, in the opinion of the trustee, be fit and proper beneficiaries of this trust. It shall be the duty of such executor, administrator, grantee or assignee to offer said share or shares for appraisal, and to be taken by said trustee whenever requested by said trustee, and no dividend shall be paid or allowed upon any such share or shares after failure to comply with such request. Said trustee shall not, however, be obliged to take any share or shares at the appraised value aforesaid, unless he shall think fit, but if he shall not, within thirty days after such appraisal, take the same and pay or tender therefor to such shareholder, executor, administrator, grantee or assignee, the price at which the same shall have been appraised, such shareholder, executor, administrator, grantee, or assignee shall be at liberty to sell and dispose of the said share or shares to any person whatever. The trustee shall hold any share or shares acquired by him pursuant to this article as a part of the trust estate, with the same powers with reference thereto given to him by this instrument with reference to any other property held by him hereunder. In case any share is pledged or transferred as collateral, any certificate issued to the pledgee shall bear on its face the statement that such certificate is held as collateral, and the pledgee or transferee shall be entitled to none of the rights of a shareholder, except to receive dividends and in case such pledge is foreclosed, the preceding provisions of this article relating to the sale of shares shall take effect.

Seventh. The trustee under this instrument shall have the following powers:

82 1. To receive and collect all interest, rentals, dividends and other income of property held by him.

2. To incur such liability and expenses, and pay from the trust property in his hands all such sums as he thinks proper for the management and care of said property, including taxes, assessments, fire and other insurance, repairs, counsel fees, wages and salaries of agents and employees, and all other charges.

3. To make any improvements, changes, or alterations in or upon any real estate held by him, including tearing down and rebuilding any structures from time to time existing thereon, and to pay therefor from the trust property in his hands, or from money borrowed and hereinafter provided.

4. To lease from time to time for such periods, and on such terms, as he shall think fit, all or any part or parts of any real estate held by him.

5. To exchange, sell, and convey with such covenants as he thinks proper, or without any covenants, all or any part of or any interest in or easement or privilege over any trust property held by him, at public or private sale, for cash or on credit, on such terms, and for such consideration, and with such restrictions and reservations as he may think fit, or otherwise to dispose of any property so held by him, including power to give partial releases of any mortgage held by him, upon such terms and for such considerations as he shall deem expedient.

6. To buy and pay for from the trust property in his hands, or with money raised by him, as hereinafter provided, or otherwise to acquire from time to time, and as often as he shall think fit, any property, real or personal, wherever situated, including shares in this trust, for such price, and upon such terms, as he thinks fit, and to hold the same with the same powers of management and sale as are herein provided, and from time to time, and as often as he shall think fit, to make any change in the investments of any trust property held by him.

7. To borrow, with or without any personal obligation for the repayment thereof, money to improve any part of the trust estate, or to purchase other property to be held subject to this trust, and to mortgage or pledge any of the trust property to secure the repayment of any sums so borrowed, and to indemnify himself against personal liability therefor, and to repay any sums so borrowed, and any interest accruing due thereon from the trust property in his hands.

8. To make dividends from time to time from the income of the trust property held by him at such rates as he shall think fit, reserving all, or such part of the income in any year as he shall deem proper, and to make division of or dividends from the principal of said property or any part thereof whenever he shall think fit.

9. To take any proceedings at law or in equity with reference to the trust estate, or any matter concerning it, and to represent the interests of the trust estate in any proceedings brought by or against him, or in any way affecting it, with power to compromise and refer to arbitration any dispute in any way affecting said trust property.

10. To take any steps, and do any acts that he may deem necessary or proper for the due care and management of said estate, including power to enter upon any property mortgaged by him, execute any power of sale contained in any such mortgage, and do any act necessary to foreclose the same.

11. To make, execute, acknowledge, and deliver all necessary or proper deeds, instruments, and agreements conveying the said trust property or any part thereof, or any interest therein, or in any way

relating to or affecting the same, or to carry out any of the power herein contained.

12. To appoint at any time, or from time to time, an agent or agents, or attorney or attorneys, with authority to exercise any part or all of the powers hereby vested in said trustee.

13. To do any other acts in the care and management of said property, and to exercise any power or authority appurtenant thereto, or connected therewith which he might do or exercise if he were absolute owner thereof free from any trust.

Eighth. The trustee shall not have power to create any personal liability on the shareholders, but all contracts made by him, 84 including any covenants contained in any conveyance by him shall be binding upon the trust property in his hands, and every contract made by him shall specify that the same creates no personal liability or obligation on the part of said shareholders.

Ninth. The trustee may at any time appoint one or more co-trustees in the manner hereinafter provided, and the shareholders may at any time in the manner hereinafter provided for removing a trustee, direct that the number of trustees be increased, and there shall thereupon be deemed to be a vacancy or vacancies in respect of such additional trustees, to be filled in the manner hereinafter provided. Any trustee under this instrument may at any time resign his office by instrument in writing signed, sealed, and acknowledged, as required for the acknowledgment of deeds, and every such instrument shall be recorded wherever this declaration of trust is recorded. Upon the resignation, death, or removal of said Jacob H. Hecht as trustee, Louis Hecht, Jr. of said Boston, shall become trustee hereunder, or if he is dead, or for any reason fails to accept said trust, and upon his resignation, death, or removal, Marcus H. Hecht of San Francisco, in the State of California, shall become trustee hereunder. Any trustee may be removed by instrument in writing signed, sealed, and acknowledged, as required for the acknowledgment of deeds by holders of record for the time being of not less than three-fourths of all the shares. In case of the resignation, death, removal, or incapacity from any cause of any trustee hereunder, or any vacancy arising in said trusteeship, the surviving or remaining trustee, if any, may exercise all powers herein conferred upon the trustee until a new trustee is appointed. Every new trustee, except as above provided, shall be appointed by instrument in writing, signed, sealed, and acknowledged, as required for the acknowledgment of deeds by the remaining trustee, or if there is no remaining trustee, by like instrument so executed by the holders for the time being of at least three-fifths of all the shares under this trust. Every such instrument of resignation, removal, or appointment shall be recorded forthwith 85 wherever this declaration of trust is recorded. Any trustee named in this agreement to succeed to said trust shall from the date of the death of his predecessor, or from the date of the record of the resignation or removal of his predecessor, as the

case may be, and any trustee appointed in the manner above provided shall from the date of record of such appointment, be vested with all the estate and interest, and have all the powers and privileges, and be subject to all the duties and liabilities herein granted to or imposed on the said trustee, without the necessity of any further instrument of conveyance. The certificate in writing of such remaining trustee of the existence of the facts authorizing such appointment, and the certificate in writing of the transfer agent for the time being, attached to any instrument of removal or appointment, stating that the persons who executed such instrument were at the time shareholders of record and held the number of shares in such instrument stated, when duly recorded wherever this instrument is recorded, shall be conclusive evidence of the facts therein set forth in favor of any person acting in good faith in reliance thereon. It shall be the duty of any trustee who resigns or is removed, or becomes incapacitated, and of the heirs, executors, and administrators of any trustee who dies, to execute any instrument or instruments of conveyance or transfer reasonably required of him or them by the surviving or remaining trustee or his successor, or the shareholders, to perfect the transfer of title to said property.

Tenth. No trustee under this instrument, whether original or appointed to fill a vacancy, shall be required to give any bond.

Eleventh. The trustee may at any time in the manner provided in Article Ninth for appointing a co-trustee, appoint and thereafter in like manner remove an associate trustee, who shall have no title to the trust property, but shall have power to exercise, whenever there is only one trustee, if such trustee is absent from the Commonwealth, or incapacitated, and upon his death or resignation, until a new trustee is appointed, all the powers in respect to the control and management of the trust property herein conferred upon the trustee. Whenever there is more than one trustee, either may act alone, if the
86 other is absent or incapacitated. The certificate in writing of such associate trustee, or of a co-trustee so acting, shall be conclusive evidence in favor of persons dealing with him in good faith, and in reliance thereon, of the existence of the facts therein set forth, authorizing him to act.

Twelfth. This declaration of trust may, at any time, be modified in any particular, and this trust may at any time be terminated, and any instructions may at any time be given to the trustee hereunder by instrument in writing and under seal, signed, sealed, and acknowledged, as required for the acknowledgment of deeds, by the holders of record of not less than three-fifths of all the shares. Such instrument shall forthwith be recorded wherever this instrument is recorded, and the certificate of the trustee for the time being or either of them, if more than one, or of the transfer agent for the time being that the persons who executed the same were at the time the holders of record of the number of shares stated in said instrument shall be conclusive evidence of such fact in favor of persons acting in good faith in reliance thereon.

Thirteenth. Whenever this trust shall be terminated, the property then held by the trustee shall be sold and the proceeds thereof distributed among the shareholders, or shall be otherwise disposed of as provided in an instrument terminating this trust.

Fourteenth. Any shareholder may hire or buy any of the trust property from the trustee, and enter into contracts with him. No person dealing with anyone who by the record where this instrument is recorded appears to be the trustee hereunder, shall be bound to inquire into the existence of any fact justifying the exercise of any power herein contained, or to see to the application of the purchase money, rent, or other money, or consideration paid by him, and no such person shall be affected by the resignation, removal, or appointment of any trustee hereunder, or by any instructions given to the trustee, or by any modification of the terms of this trust, unless the instrument containing such resignation, removal, appointment, instructions, or modification, has at the time been recorded where this instrument is recorded.

87 Fifteenth. The trustee may exercise as to any share acquired and held by him for the benefit of the trust estate, all the powers which individuals owning said shares, *all the powers which individuals owning said shares* might exercise, and such shares shall be included in determining the proportion of shares hereinbefore referred to.

Sixteenth. No trustee under this instrument shall be personally liable for the act, omission, or default of any co-trustee or associate trustee, or of any agent appointed by him, or for any cause except his own personal and willful act or default or gross negligence.

We, the persons above named, as shareholders, hereby severally acknowledge that the property herein referred to is held on the trusts above set forth, and none other, and we hereby covenant, each for himself or herself, and for his or her executors, administrators and assigns, with each of the others and his or her executors or administrators, and with the trustee and his heirs, executors, administrators, and assigns, to abide by and conform to all the provisions of this instrument.

In witness whereof, I, the said Jacob H. Hecht, the trustee within named, have hereunto set my hand and seal, and we, the said Jacob H. Hecht, Louis Hecht, Jr., Marcus H. Hecht, Blemma Hecht, Marcus H. Hecht, Blemma Hecht and Bert R. Hecht (the last three as trustees under the will of Isaac Hecht deceased for the benefit of Helen Hecht, Florence H. Fries, Elsie S. Hecht, Summit L. Hecht and Bert R. Hecht) Amelia K. Hecht, Edith Hecht, Elias M. Hecht, Joel K. Hecht and Adelheid Hecht, in token that the foregoing are the trusts and the only trusts on which said property above described is held, have hereunto set our hands and common seal, which each of us hereby adopts, on this first day of April, A. D. 1899.

JACOB H. HECHT. [SEAL.]

JACOB H. HECHT.

LOUIS HECHT, JR.

M. H. HECHT.

BLEMMA HECHT,

M. H. HECHT,

BERT R. HECHT,

Trustees under the Will of Isaac Hecht for the Benefit of Helen Hecht, Florence H. Fries, Elsie S. Hecht, Bert R. Hecht, Summit L. Hecht, Beneficiaries under the Will of Isaac Hecht, the Above Trustees and Beneficiaries Being Jointly Interested as Shareholders to the Amount of One Hundred (100) Shares.

AMELIA K. HECHT.

EDITH HECHT.

ELIAS M. HECHT.

JOEL K. HECHT.

ADELHEID HECHT.

BLEMMA HECHT.

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

April 11th, 1899.

Then personally appeared the above named Jacob H. Hecht and acknowledged the foregoing instrument to be his free act and deed.

Before me,

WILLIAM H. DUNBAR,

Justice of the Peace.

Boston, May 13, 1899, at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606, Page 481.

Attest:

THOS. F. TEMPLE,

Register.

Know all men by these presents that I, Lina Frank Hecht, wife of Jacob H. Hecht, the trustee named in the foregoing declaration of trust, hereby acknowledge that the property described in said

declaration of trust was acquired and held by my husband as trust property, and that I am not entitled to any right of or to the dower or homestead therein or in any part thereof, and for consideration of ten (10) dollars and other valuable considerations paid to me by Louis Hecht, Jr., one of the beneficiaries named in said declaration of trust, the receipt whereof is hereby acknowledged, I hereby covenant and agree with said Louis Hecht, Jr. and with each of the other beneficiaries named in said declaration that upon any sale of any part of said trust property by said Jacob H. Hecht, I will join, if requested, in any deed conveying the same for the purpose of releasing all right of or to dower and homestead in the property so conveyed, and whenever said Jacob H. Hecht ceases to be trustee thereunder, I will forthwith, upon request, and for a consideration of one (1) dollar, release to his successor or successors in said trust, all right of or to dower or homestead in all the property so held in trust.

In witness whereof I, the said Lina Frank Hecht, hereunto set my hand and seal this first day of April A. D. 1899.

LINA FRANK HECHT. [SEAL.]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Boston, April 11th, A. D. 1899.

Then personally appeared the above named Lina Frank Hecht and acknowledged the foregoing instrument to be her free act and deed.

Before me,
[Notarial Seal.]

FRANK W. NASH,
Notary Public.

Boston, May 13, 1899, at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606 Page 491.

Attest:

THOS. F. TEMPLE,
Register.

I, Jacob H. Hecht, in my capacity of trustee under the declaration of trust of the Hecht Real Estate Trust dated April 1, 1899, to be recorded with Suffolk (Mass.) Deeds, and pursuant to the power conferred upon me by said declaration of trust, hereby constitute and appoint Louis Hecht, Jr. of Boston in said County of Suffolk and Commonwealth of Massachusetts, to be the transfer agent for the transfer of the shares in said trust.

90 In witness whereof I hereto set my hand and seal this twelfth day of April, A. D. 1899.

JACOB H. HECHT. [SEAL.]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

April 17, 1899.

Then personally appeared the above named Jacob H. Hecht and acknowledged the foregoing instrument to be his free act and deed.
Before me,

WILLIAM H. DUNBAR,
Justice of the Peace.

Boston May 13 1899 at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606 Page 492.

Attest:

THOS. F. TEMPLE,
Register.

Whereas Jacob H. Hecht is the absolute owner of the record title to certain real estate situated in the City of Boston in the County of Suffolk and Commonwealth of Massachusetts, to wit: "A certain parcel of land situated in said Boston with a brick dwelling house thereon numbered forty (40) on Edinboro Street and bounded Westerly by said Street twenty-three (23) feet and six inches; Southerly by Beach Street fifty-six (56) feet; Easterly by land now or late of John P. Thorndike, by a line so drawn as to include four (4) inches of the brick wall, twenty-three (23) feet and six (6) inches; and Northerly by the house and land numbered thirty-eight (38) on said Edinboro Street, now or formerly owned by Charles L. Goodnow, by a line through the centre of a brick partition wall, fifty-six (56) feet, or however otherwise bounded and described. Being the same premises described in a deed of Martha A. Tuttle et al., executors, and trustees, dated March 3, 1899, and recorded with Suffolk Deeds, Book 2590, page 590; and

Whereas said Hecht in fact holds said premises for the benefit of the persons named as shareholders in the Hecht Real Estate Trust so called upon all and the same trusts set forth in a declaration of trust dated April 1st, 1899, to which this instrument is subjoined:

Now therefore I, the said Jacob H. Hecht, hereby declare that said real estate above described is held by me, and I hereby for myself and my heirs, executors, and administrators, covenant with the several persons named in the said declaration of trust as shareholders, and their respective heirs, executors, administrators, and assigns, to stand seized of said real estate upon the trusts, to the uses, for the purposes, and with the powers, set forth in said declaration of trust of the Hecht Real Estate Trust so called, to which this instrument is subjoined, and none other, in precisely the same manner as if the real estate herein described had been included in the real estate described in said declaration of trust.

In witness whereof I the said Jacob H. Hecht hereunto set my hand and seal this eighth day of May, A. D. 1899.

JACOB H. HECHT. [SEAL.]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

May 8th, 1899.

Then personally appeared the above named Jacob H. Hecht, and acknowledged the foregoing instrument to be his free act and deed before me,

WILLIAM H. DUNBAR,
Justice of the Peace.

Boston, May 13, 1899 at 1 o'clock and 49 minutes P. M. Received and Entered with Suffolk Deeds, Libro 2606 Page 492.

Attest:

THOS. F. TEMPLE,
Register.

Know all men by these presents that I, Lina Frank Hecht, wife of Jacob H. Hecht, the trustee named in the foregoing declaration of trust, hereby acknowledge that the property described in said declaration of trust, was acquired and held by my said husband as trust property, and that I am not entitled to any right of or to dower or homestead therein, or in any part thereof, and in consideration of ten (10) dollars and other valuable considerations paid to me by Louis Hecht, Jr. one of the beneficiaries named in said declaration of trust, the receipt whereof is hereby acknowledged,

92 hereby covenant and agree with said Louis Hecht, Jr. and with each of the other beneficiaries named in said declaration of trust, that upon any sale of any part of said trust property by said Jacob H. Hecht, I will join, if requested in any deed conveying the same for the purpose of releasing all right of or to dower and homestead in the property so conveyed, and whenever said Jacob H. Hecht ceases to be trustee thereunder, I will forthwith, upon request, and for a consideration of one (1) dollar release to his successors in said trust, all right of or to dower or homestead in all the property so held in trust.

In witness whereof I the said Lina Frank Hecht hereunto set my hand and seal this eighth day of May, A. D. 1899.

LINA FRANK HECHT. [SEAL]

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Boston, May 10th, A. D. 1899.

Then personally appeared the above named Lina Frank Hecht and acknowledged the foregoing instrument to be her free act and deed, before me,

[Notarial Seal.]

FRANK W. NASH,
Notary Public.

Boston, May 13, 1899 at 1 o'clock and 49 minutes P. M. Received
and Entered with Suffolk Deeds, Libro 2606 Page 493.

Attest:

THOS. F. TEMPLE,
Register.

On the same day, the following Answer to Substituted Declaration was filed:—

Answer to Substituted Declaration.

[Filed August 23, 1920.]

Now comes the defendant in the above-entitled action and for answer denies each and every allegation, item, count and particular in the plaintiff's writ and declaration contained.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.

93 This cause was thence continued to the the September Term, A. D. 1920, when, to wit, November 16, 1920, the following Waiver of Jury Trial was filed:—

Waiver of Jury Trial.

[Filed November 16, 1920.]

Now come the parties in the above-entitled action and waive right of jury trial.

DANIEL J. GALLAGHER,
United States Attorney.
ALONZO H. GARCELON,
Special Assistant U. S. Attorney.
ALFRED F. FISH,
DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

This cause was thence continued to the December Term, A. D. 1920, when, to wit, December 29, 1920, this cause came on to be heard by the court without a jury.

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, an opinion of the court was filed.

This cause was thence continued to the present December Term, A. D. 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant within extended time and is allowed by the court on March 4, 1922.

On the fourteenth day of March, A. D. 1922, the following Agreement for Judgment is filed:—

Agreement for Judgment.

[Filed March 14, 1922.]

It is hereby mutually agreed that judgment for the plaintiffs may be entered forthwith upon the findings of the court as of this fourteenth day of March, 1922, in the sum of \$2,826.25 damages with interest on the amounts included therein from the respective dates of payment in the sum of \$557.75 and their costs of suit taxed at \$—.

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DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Plaintiff.
ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Thereupon, to wit, March 14, 1922, it is considered by the court that the said Louis Hecht, Jr., and Simon E. Hecht, Trustees, plaintiffs, recover from said John F. Malley, former collector, on the finding of the court, the sum of three thousand three hundred eighty-four dollars (\$3,384) damages, and their costs of suit taxed at

Defendant's Bill of Exceptions.

[Filed February 1, 1922; Allowed March 4, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of the Hecht Real Estate Trust to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed under the requirements of Title IV, Section 407, of an act entitled "An Act to Increase the Revenue and for other purposes," approved September 8, 1916 (39 Stat. 756), and under the requirements of Section 1000 of the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057). The plaintiffs' declaration alleges in substance that the Hecht Real Estate Trust is not an association subject to said taxes within the meaning of said Acts. All the material facts in the case are contained

(1) In the declaration of trust which was annexed to and made a part of the plaintiffs' declaration and which is incorporated in this bill of exceptions by reference.

(2) In the findings of facts made by the court and the copies of records and documents referred to therein is "attached hereto" and filed in this case.

95

This case was tried before Judge Morton, without a jury who made and filed certain findings of facts. Said findings

of facts, together with copies of records and documents referred to herein as "attached hereto," are as follows:

"Members of the Hecht family, holding title as tenants in common to a large amount of real property, conveyed the same in the year 1899 to Jacob H. Hecht who agreed to hold the same in trust for the beneficiaries named in the trust instrument, and their assignees.

"A copy of the trust instrument is attached to the plaintiffs' Declaration.

"The copy of this trust instrument, together with certain other copies of documents or records referred to herein as being 'attached hereto' are, I find, true copies.

"There were one thousand (1,000) shares issued to the twelve parties mentioned in the trust deed in lots from twenty-five (25) to two hundred (200) shares, and certificates representing the number of shares were issued to the various parties enumerated in accordance with the trust declaration. A copy of one of these certificates is attached hereto.

"The original trustee and his successors have managed the property referred to in said instrument, making and renewing leases, collecting the rents due, paying taxes and insurance, seeking new tenants when there were vacancies, and maintaining the property in repair; providing heat, light and elevator and janitor service, and in general doing those things incident to the management of business property. Net rentals are distributed according to the ownership of record of the shareholders. The buildings and property owned are used for offices, storage lofts and such other business purposes as city property in the locality is used.

"The trustees hold, in addition to real estate, a note secured by real estate mortgage, for \$157,000.

"No meetings of the shareholders have been held at any time, and there has been no amendment made to the trust instrument.

96. "There has never been a removal of any trustee acting under the said instrument.

"The following is a list of the original shareholders, with the number of shares held by each:

Shareholder.	Shares.
M. H. Hecht.....	200
Mrs. Isaac Hecht.....	100
Bert R. Hecht.....	20
Summit L. Hecht.....	20
Louis Hecht, Jr.	200
Lina F. Hecht.....	100
Louis Hecht, Jr., Trustee.....	100
Helen Hecht.....	20
Elsie H. Wiel.....	20
Florence H. Fries.....	20
Hecht Investment Co.	200
	<hr/>
	1,000

"The 200 shares of M. H. Hecht have been transferred as follows, and new certificates issued:

Shareholder.	Shares
Hilda Hecht Gerstle.....	50
Sara Hecht Gerstle.....	50
Grace Hecht Rothschild.....	50
Rose Ellen Stein.....	50

"The 100 shares of Mrs. Isaac Hecht have been transferred as follows and new certificates issued:

Hecht-Fries-Wiel Co.	60
Bert R. Hecht	20
Summit L. Hecht.....	20

"The 20 shares held by Helen Hecht, 20 shares held by Elsie H. Wiel and 20 shares held by Florence H. Fries have been transferred and new certificate issued to the Hecht-Fries-Wiel Company.

"Louis Hecht, Jr., one of the trustees, holds 200 shares as an individual and holds 100 shares as trustee for the estate of Jacob H. Hecht.

"Louis Hecht, Jr., has been a trustee since 1903, and Simon Hecht since July, 1919. Simon Hecht holds no shares as an individual. The plaintiff hereafter referred to is Louis Hecht, Jr.

"A clerk employed in the office of the trustee acts as a transfer agent recording transfers of certificates of shares in accordance with said trust instrument.

"A copy of letter which the trustee sent out to shareholders when forwarding checks for a dividend from the Hecht Real Estate Trust, which is a typical sample of the letters sent out for this purpose, is attached hereto.

"There have been annual statements showing the assets and liabilities and the net income of the Hecht Real Estate Trust sent to the shareholders, and fair samples of such statements, are attached hereto.

"In the record books of the Hecht Real Estate Trust there is carried a 'Capital Account' and a 'Surplus Account.' The 'Surplus Account' on December 1, 1919, amounted to \$136,500.

"The 'Capital Account' has, however, not remained fixed but has been increased by credits from 'Surplus.'

"During each year the 'trustee' or 'trustees' of the Hecht Real Estate Trust has or have made a report of income received by the 'trustee' or 'trustees' to the Collector of Internal Revenue on the forms used by corporations, and has paid a tax on the income in the same manner as a corporation pays a tax on its income. The shareholders have individually reported in their income tax returns the dividends or money received from the Hecht Real Estate Trust in the same manner as dividends received from a corporation and have deducted these dividends in the same manner as dividends from a corporation would be deducted in computing the individual normal income tax.

08 "The Commissioner of Internal Revenue of the United States required the Hecht Real Estate Trust to file certain returns on Form 707 prescribed by said Commissioner of Internal Revenue, showing the fair market value of the property held by the plaintiffs under said trust instrument, and further required that the said returns be prepared by the plaintiffs as an association known as the Hecht Real Estate Trust; and thereupon the plaintiff, in accordance with the requirement of the said Commissioner of Internal Revenue, filed such returns, incorporated herein by reference, with the Collector of Internal Revenue for the Third District of Massachusetts.

"On or about January 1, 1919, the Commissioner of Internal Revenue, acting under the Revenue Act of 1916, then in force, assessed capital stock taxes of three hundred twenty-five and 25/100 (325.25) dollars for the six months ending June 30, 1917, and six hundred fifty and 50/100 (650.50) dollars for the year ending June 30, 1918, upon the Hecht Real Estate Trust.

"Thereafter, the said defendant, John F. Malley, as Collector of Internal Revenue for the Third District of Massachusetts, sent notice and demand, incorporated herein by reference, to the Hecht Real Estate Trust for the capital stock taxes assessed as aforesaid, and made demand upon the Hecht Real Estate Trust to pay the said taxes of three hundred twenty-five and 25/100 (325.25) dollars; and thereupon, in compliance with said demand, the plaintiffs as trustees for the Hecht Real Estate Trust on the ninth day of January, 1918, paid to the defendant, as Collector of Internal Revenue, the said sums of three hundred twenty-five and 25/100 (325.25) dollars and six hundred fifty and 50/100 (650.50) under written protest, incorporated herein by reference.

"Thereafter, the defendant, in writing, acknowledged receipt of the said payments.

99 "Thereafter on or about February 1, 1919, the said Commissioner of Internal Revenue, acting under the Revenue Act of 1918, assessed capital stock taxes of six hundred fifty-seven and 50/100 (657.50) dollars for the year ending June 30, 1919, and on or about July 1, 1919, acting under the Revenue Act of 1918, assessed capital stock taxes of eleven hundred ninety-three (1,193) dollars for the year ending June 30, 1920, upon the Hecht Real Estate Trust.

"Thereafter, the said defendant, John F. Malley, as Collector of Internal Revenue for the Third District of Massachusetts, sent notice and demand to the Hecht Real Estate Trust for the capital stock taxes assessed as aforesaid, and made demand upon the Hecht Real Estate Trust to pay said taxes of six hundred fifty-seven and 50/100 dollars, and eleven hundred ninety-three (1,193) dollars; and thereupon, in compliance with said demand, the plaintiffs, as Trustees for the Hecht Real Estate Trust, on the tenth day of February, 1919, paid to the defendant, as Collector of Internal Revenue as aforesaid, the said sum of six hundred fifty-seven and 50/100 (657.50) dollars, under written protest, incorporated herein by reference, and on the

twenty-sixth day of July, 1919, paid to said defendant, as Collector of Internal Revenue as aforesaid, the said sum of eleven hundred ninety-three (1,193) dollars. The plaintiffs have produced no evidence that this payment was made under protest at time of payment.

"Thereafter, on March 29, 1920, the plaintiffs claimed that the moneys paid by them as aforesaid to the defendant be refunded, by application therefor in writing, incorporated herein by reference to said Commissioner of Internal Revenue.

"Thereafter, the said claims for refund were denied by the said Commissioner of Internal Revenue, and notice of such denial was given to the plaintiffs by letter dated April 27th, 1920, a copy of which is attached hereto. Said amounts of three hundred twenty-five and 25/100 (325.25) dollars; six hundred fifty and 50/100 (650/50) dollars; six hundred fifty-seven and 50/100 (657.50) dollars; and eleven hundred ninety-three (1,193) dollars have not been repaid to the plaintiffs.

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PLAINTIFF'S EXHIBIT 3.

(Copy of Certificate.)

No. —.

Commonwealth of Massachusetts.

— Shares.

Hecht Real Estate Trust.

1,000 Shares.

This certifies that — is the holder of — shares in the Hecht Real Estate Trust, subject to the declaration of trust, dated April 1, 1899, recorded with Suffolk County (Mass.) Deeds, Book 2608, Page 481.

This Certificate is transferable only on the books of the Trustee in person or by attorney, upon the surrender of this Certificate, and subject to the provisions endorsed thereon.

In witness whereof, the Trustee of said trust has hereunto set his hand this — day of —, A. D. —

_____,
Trustee.

Countersigned:

_____,
Transfer Agent.

(Back of Certificate.)

Article Sixth.

The shares of this trust shall be transferable only upon the books of the trustee, to be kept by a transfer agent to be appointed by him and by instrument in writing, executed by the shareholder or his duly authorized agent. Any shareholder, if desirous of selling or transferring any of his shares, except to a person then a shareholder

or to a lineal descendant of Elias Hecht, or to the husband or wife or widower or widow, or such descendant, and the executor administrator of any deceased shareholder, if desirous of selling, except as aforesaid, any share or shares belonging to the estate of such deceased shareholder, or of transferring same, except to a legatee, or to the person entitled to distributive shares in case of intestacy, and the grantee or assignee of any shares taken or sold by process of law, or by foreclosure of any pledge or hypothecation, if desirous of selling any share or shares except as aforesaid, shall first notify the trustee of such desire.

101 The trustee shall then select one beneficiary as an appraiser, and the person desirous of selling shall select another beneficiary as an appraiser, and these two shall select a third, who need not be a beneficiary. The three so appointed shall appraise the shares proposed to be sold, and the majority of them shall have the power to determine their value. The trustee shall thereupon, unless the shares be withdrawn from sale, have the option for thirty days of purchasing said shares for said trust estate at the appraised value, or of placing them with such person or persons as may in the opinion of the trustee be fit and proper beneficiaries of this trust.

It shall be the duty of such executor, administrator, grantee or assignee, to offer said share or shares for appraisal, and to be taken by said trustee whenever requested by said trustee, and no dividend shall be paid or allowed upon any such share or shares after failure to comply with such request. Said trustee shall not, however, be obliged to take any share or shares at the appraised value aforesaid, unless he shall think fit, but if he shall not, within thirty days after such appraisal, take the same and pay or tender therefor to such shareholder, executor, administrator, grantee or assignee, the price at which the same shall have been appraised, such shareholder, executor, administrator, grantee, or assignee, shall be at liberty to sell and dispose of the said share or shares to any person whatever. The trustee shall hold any share or shares acquired by him, pursuant to this article as a part of the trust estate, with the same powers with reference thereto given to him by this instrument with reference to any other property held by him hereunder.

In case any share is pledged or transferred as collateral, any certificate issued to the pledgee shall bear on its face the statement that such certificate is held as collateral, and the pledgee or transferee shall be entitled to none of the rights of a shareholder, except to receive dividends, and in case such pledge is foreclosed, the preceding provisions of this article relating to the sale of shares shall take effect.

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DEFENDANT'S EXHIBIT 5.

Louis Hecht, Jr., Trustee,
497 Summer Street.

Boston, Mass., December 29, 1919.

Hecht Investment Co.,
708 Kohl Building,
San Francisco, Calif.

DEAR SIRs:

I beg to enclose herewith a check for \$14,200 as dividend for the year 1919, account of the Hecht Real Estate Trust.

Wishing you a Happy New Year,

Yours very truly,

LOUIS HECHT, JR.,
Trustee.

L. H. B. Enclosure.

PLAINTIFF'S EXHIBIT 6.

Statement—March 31, 1917.

Hecht Real Estate Trust.

Assets.		Liabilities.	
New York Property.....	750,000.	Capital	\$1,310,080.97
Atlantic Ave. "	525,292.20	Undivided profits.....	275.71
Beach Street "	30,000.	Profit and loss.....	152,211.25
Rochester Power Co. Mtge.	157,000.		
	164.49		
Cash	111.22		
	275.71		
	<u>\$1,462,567.91</u>		<u>\$1,462,567.91</u>

Dividend No. 19 declared March 31, 1917, \$19.00 per share.

Net Income Atlantic Ave. property.....	\$21,489.25	
	111.22	
" " Beach Street "		\$21,378.03—4.07%
" " Rochester Power Mortgage.....		556.97—1.85%
		7,065. —4.50%
		<u>29,000.00</u>
Loss New York Realty.....		9,400.00—1.25%
		<u>\$19,600.00</u>

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PLAINTIFF'S EXHIBIT 7.

Statement—March 30, 1918.

Hecht Real Estate Trust.

Assets.		Liabilities.	
New York property....	750,000.	Capital	\$1,462,292.20
Atlantic Ave. "	525,292.20	Undivided profits.....	260.38
Beach Street "	30,000.	Reserved for taxes.....	7,057.64
Rochester Power Co.			
Mtge.	157,000.		
Cash in Bank.....	260.38		
Cash dep, with Dunbar,			
Nutter & McC.....	7,057.64		
	<u>\$1,469,610.22</u>		<u>\$1,469,610.22</u>

Dividend No. 20 declared March 30, 1918, \$55 per share.

Net Income New York property.....	\$19,800.00—2.64%
" " Atlantic Ave. "	34,687.92—6.60%
" " Beach Street "	504.72—1.68%
" " Rochester Power Co. Mtge.....	7,065.00—4.50%
	<u>\$62,057.64</u>
Reserved for taxes.....	7,057.64
	<u>\$55,000.00</u>

PLAINTIFF'S EXHIBIT 8.

Statement—December 31, 1918 (9 Months).

Hecht Real Estate Trust.

Assets.		Liabilities.	
Atlantic Ave. Bldg.....	290,000.	Capital	1,462,292.20
" " Land.....	435,292.20	Surplus	152,376.
New York Bldg.....	275,000.	Depreciation Reserve...	47,625.
" " Land.....	475,000.	*Undivided profits.....	56,714.72
Beach Street Bldg.....	10,000.	Reserved for city taxes.	3,200.
" " Land.....	20,000.		
Rochester Power Co.			
Mtge.	157,000.		
104 *Cash in Bank...	56,714.72		
Cash with Dun-			
bar. Nutter & McClen-			
nen	3,200.		
	<u>\$1,722,206.92</u>		<u>\$1,722,206.92</u>

*These items have been reduced to \$714.72 by the distribution of Dividend #21, amounting to \$56,000.

Dividend No. 21 declared Dec. 31, 1918, \$56 per share.

Net Income New York property.....	\$15,500.
" " Atlantic Av. "	33,608.69
" " Beach St. "	21.61
" " Rochester Power Co. Mtge.....	5,298.75
	<u>\$54,519.05</u>
From Tax Reserve.....	1,480.95
	<u>\$56,000.00</u>

PLAINTIFF'S EXHIBIT 9.

Statement—December 31, 1919.

Hecht Real Estate Trust.

Assets.		Liabilities.	
Atlantic Ave. Bldg.....	290,000.	Capital	1,402,292.20
" " Land.....	435,292.20	Surplus	136,500.
New York Bldg.....	275,000.	Depreciation Reserve...	63,500.
" " Land.....	475,000.	Reserved for city taxes..	3,550.
Beach Street Bldg.....	10,000.	Undivided profits.....	834.55
" " Land.....	20,000.		
Rochester Power Co.			
Mtge.	157,000.		
Cash in bank.....	834.55		
Cash with Dunbar, Nut-			
ter & McC.....	3,550.		
	<u>\$1,666,676.75</u>		<u>\$1,666,676.75</u>

105 Dividend No. 22 declared December 31, 1919, \$71 per share.

Reserved for city taxes 12/31/18.....	\$3,200.		
Cash in bank.....	714.72		
		3,914.72	
Net Income New York property.....		22,031.79—3.	
" " Atlantic Ave. "		42,148.95—5.81	
" " Beach St. "		224.00—1.0075	
" " Rochester Power Co. Mtge.....		7,065.00—4.50	
		<u>\$75,384.55</u>	
Reserved for city taxes.....	3,550.		
Cash in Bank.....	834.55		
		<u>4,384.55</u>	
		<u>\$71,000.00</u>	

"Treasury Department.

Washington, April 26, 1920.

Messrs. Dunbar, Nutter & McClennen,
161 Devonshire Street,
Boston 9, Massachusetts.

GENTLEMEN:

Re Hecht Real Estate Trust.

Your claims for the refunding of \$975.75 * * * and \$2,600 capital stock tax for the taxable periods ended June 30, 1917, June 30, 1918, June 30, 1919, and for the taxable period ending June 30, 1920, have been considered.

The Declaration of Trust submitted shows that the beneficiaries of the trust reserve the power to appoint additional trustees, remove existing trustees, and give instructions concerning the conduct of the trust. This office holds that the retention of such powers by the beneficiaries creates an 'association' within the meaning of Section 407 of the Revenue Act of 1916, and Section 1000 of the Revenue Act of 1918. Therefore your claims are hereby rejected in full."

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should be for the defendant.

106 2. That upon the law judgment should be for the defendant.

3. That upon the law and facts judgment should be for the defendant.

4. That the burden of proof is on the plaintiffs.

5. That the Hecht Real Estate Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1917.

7. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.

8. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1919.

9. That the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1920.

10. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from January 1, 1917, to June 30, 1917.

11. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1917, to June 30, 1918.

12. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

13. That the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

14. That there is no evidence that payment of taxes for the six months ending June 30, 1917, was made under protest.

15. That there is no evidence that payment of taxes for the year ending June 30, 1918, was made under protest.

107 16. That there is no evidence that payment of taxes for the year ending June 30, 1919, was made under protest.

17. That there is no evidence that payment of taxes for the year ending June 30, 1920, was made under protest.

18. That there has not been a compliance with the requirements of Revised Statutes Section 3226, Compiled Statute 5949.

19. That the payment of \$1,193 for capital stock tax for period from July 1, 1919, to June 30, 1920, was not made under protest and plaintiffs cannot recover this amount.

The court made and filed the following Memorandum of Decision:

"This case raises the question whether Massachusetts Trusts are subject to the tax on capital stock imposed by the Acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

"A Massachusetts Trust is a peculiar form of business organization common in this State which has frequently been considered in different aspects in the United States Supreme Court and in the Massachusetts Supreme Judicial Court.* In outline, it is an arrangement whereby property is conveyed to trustees who execute a declaration of trust to hold and manage it for the benefit of such persons as from time to time shall own certificates which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate-holders. Sometimes these are little, if any, greater than those of *cestuis que trust* under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations in which the certificate-holders meet annually, elect the trustees annually, and have power to direct the trustees, as well as to remove them. The Massachusetts decisions classify these trusts as being either 'strict trusts,' or partnerships; the former class comprising those in which the certificate-holders have substantially the same rights as *cestuis* under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have entrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute and in neither do the Massachusetts Courts recognize any entity apart from the persons of the trustees, or of the certificate-holders.

"The taxes here in question were levied under the Revenue Acts of 1916 (Sec. 407, Title IV, Act of Sept. 8, 1916) and 1918 (Sec. 1000 et seq.) The Act of 1916 provides (Title X, Sec. 1000) that 'in lieu of the tax imposed by the first subdivision of Sec. 407 of the Rev. Act of 1916' * * * 'Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair

**Elliot v. Freeman*, 220 U. S. 178; *Crocker v. Malley*, 249 U. S. 223; *Malley v. Bowditch*, 259 F. R. 809 (C. C. A. 1st Cir.); *Williams v. Milton*, 215 Mass. 1; *Dana v. Treasurer*, 227 Mass. 563; *Gleason v. McKay*, 134 Mass. 419; *Frost v. Thompson*, 218 Mass. 360.

average value of its capital stock * * * as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.' On the face of this section the Hecht Trust was not within it. The tax was imposed because of the defining section of the Act of 1918 which provides, 'The term 'corporation' includes associations, joint stock companies and insurance companies; the term 'domestic' when applied to a corporation or partnership means created or organized in the United States.'

"The Treasury Department held that the Hecht Real Estate Trust was an 'association' and therefore taxable as a corporation. It is not contended by the Government that the Trust was a 'joint stock company or an insurance company,' within the defining section quoted.

Under the Treasury Regulations (Art. 7) some trusts are 109 taxed under this statute, while others are not; trusts the members of which have all the liability of partners (see Horgan v. Morgan, 233 Mass. 381) are taxed as corporations; and the members may perhaps also be liable to taxation as partners. The underlying principle on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to create an organization distinct from the members who compose it. This was the point of view taken by Jessel, M. R., in *Smith v. Anderson*, 15 Chancery Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c. 15 Chancery Div. 273).

"The tax in question began with the Act of 1909, which imposed on 'every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company' a tax based on its net income. It was challenged as being an income tax and as such at that time unconstitutional; but it was sustained on the ground that it was not an income tax, but an excise tax. *Flint v. Stone, Tracy Co.*, 220 U. S. 107. And it was also held in *Eliot v. Freeman*, 220 U. S. 178, that Massachusetts Trusts were not subject to it, i. e., that they were neither joint stock companies or associations within its meaning. The tax of 1909 was in substance continued in the Act of 1916. But as that statute imposed a general income tax on corporations, it was recast and was based on capital stock. The tax imposed by the Act of 1916 is by express language continued by the Act of 1918, and the provisions of the former Act are, with some modifications, retained in the later one.

"Decisions under the earlier Acts are obviously of much importance in determining the meaning and scope of this one. *Eliot v. Freeman*, 220 U. S. 178, establishes that the Act of 1909 imposed an excise tax on the privilege of doing business in corporate or 'quasi-corporate' (220 U. S. 151) form, i. e., in forms not recognized 110 by common law which possess special advantages conferred by statute; and that Massachusetts Trusts are not such organizations. In *Crocker v. Malley*, 249 U. S. 223, such a trust was held not to be an 'association' the income of which was taxable under the income-tax Act of 1913. The radical differences between a Massachusetts Trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

"It is clear, I think, from the background and history of the tax and the decisions which I have referred to, that it is essential that an excise tax imposed on the privilege of doing business in corporate or 'quasi-corporate' form. The word 'association' is to be construed in the light of this general purpose and scope. The use in contracts and statutes of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general idea conveyed by the other words used in the same connection. — *'noscitur a sociis.'* Both the other kinds of organization mentioned are characterized by important and distinctive powers derived from statutes. 'Association' was intended to bring under the tax all business organizations which resemble corporations and joint-stock companies in that they invoke special statutory powers in their organization. It was probably inserted out of abundant caution in order that no such organization should escape. It ought not to be so construed as to change the basic character of the tax imposed; and I do not think that the omission of the words 'organized' etc. in the current statute, which has been urged in argument for the defendant, was intended to have that effect. The fact is that a Massachusetts Trust is fundamentally different from a corporation and is not within a statute dealing with corporations and similar organizations unless expressly specified. The persons interested are taxable as partners if the trust be of that character; otherwise as trustees and beneficiaries of a 'strict' trust.

111 "The statute under consideration in *Crocker v. Malley*, supra, taxed the income accruing 'to every corporation, joint-stock company, or association and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' If the words 'no matter how created or organized' be regarded as applying to 'associations,'—as the Court assumed in its opinion,—it is hard to discover any substantial distinction between the scope of that statute and the one here in question as far as 'associations' are concerned; and that decision seems to be nearly conclusive of the present case.

"The detailed provisions of the statute tend to support this conclusion. They make 'capital stock' the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts Trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent an aliquot part of it and of the income which it produces. There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust; and it is contended by the Government that 'capital stock' should be so interpreted. But in the very next section to that under which the tax is levied the Act refers to 'invested capital,' and taxes foreign corporations on that basis. The distinction between 'capital stock' and 'invested capital' is there recognized in the Act itself. The section

so provides that 'in estimating the value of capital stock the surplus and undivided profits shall be included,'—which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account.

"The only other question is whether the tax paid on 26 July 1919, amounting to \$1,193., cannot be recovered because it does not explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment; or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the Collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. (See *Atchison, &c., v. O'Connor*, 223 U. S. 280.)

"Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed with interest.

"I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse.

"Judgment accordingly."

To the refusal of the court to make the several rulings as requested, the defendant duly accepted.

And the defendant, being aggrieved by said refusals to rule as requested, files this his bill of exceptions, and prays that it may be allowed.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

113 March 4, 1922. Exceptions allowed.
J. M. MORTON, Jr.,
U. S. D. J.

We hereby assent to the form of the within bill of exceptions.
DUNBAR, NUTTER & McCLENNEN,
Attorneys for Plaintiffs.

Opinion of the Court.

December 3, 1921.

[MEMORANDUM.—Opinion of the Court is here omitted, as already appears as part of the defendant's bill of exceptions, and will be found printed on page 39 of this transcript of record. Jan. S. Allen, Clerk.]

Defendant's Petition for Writ of Error.

[Filed March 21, 1922.]

Now comes John F. Malley, defendant in the above-entitled cause and says that on or about the thirteenth day of March, 1922, the court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Allowed.

J. M. MORTON, JR.,
U. S. D. J.

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Defendant's Assignment of Errors.

[Filed March 21, 1922.]

Now comes the defendant in the above-entitled cause, who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.
2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.

3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.
4. That the court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.
5. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.
6. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1917.
7. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1918.
8. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1919.
9. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust had capital stock and was carrying on and doing business during the period prior to June 30, 1920.
10. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from January 1, 1917, to June 30, 1917.
11. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1917, to June 30, 1918.
12. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.
13. That the court erred in its denial and refusal of the defendant's request for ruling that the Hecht Real Estate Trust was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1919, to June 30, 1920.

14. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the six months ending June 30, 1917, was made under protest.

15. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the year ending June 30, 1918, was made under protest.

16. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the year ending June 30, 1919, was made under protest.

17. That the court erred in its denial and refusal of the defendant's request for ruling that there is no evidence that payment of taxes for the year ending June 30, 1920, was made under protest.

18. That the court erred in its denial and refusal of the defendant's request for ruling that there has not been a compliance with the requirements of Revised Statutes Section 3226, Compiled Statute 5949.

19. That the court erred in its denial and refusal of the defendant's request for ruling that the payment of \$1,193 for capital stock tax for period from July 1, 1919, to June 30, 1920, was not made under protest and plaintiffs cannot recover this amount.

20. That the court erred in making a general finding and ruling that the plaintiffs were entitled to recover each of the sums claimed with interest.

ROBERT O. HARRIS,
United States Attorney.
FREDERIC S. HARVEY,
Assistant U. S. Attorney.

Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Louis Hecht, Junior, of Boston, Massachusetts, and Simon E. Hecht, of Boston, Massachusetts, as Trustees of the Hecht Real Estate Trust, so-called, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts, wherein John F. Malley, of 142 Fuller Street, Brookline, Massachusetts, with place of business at 15 State Street, Boston, Massachusetts, formerly Collector of Internal Revenue, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error

mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
United States District Judge.

Acknowledgment of Service of Citation on Writ of Error.

Service of the within citation is hereby accepted, March 27, 1922.

DUNBAR, NUTTER & McCLENNEN,
Attorneys for the Defendants-in-Error.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled, No. 1226, Law Docket, Louis Hecht, Jr., et al., Plaintiffs, v. John F. Malley, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this twentieth day of April, A. D. 1922.

[SEAL.]

JAMES S. ALLEN,
Clerk.

119 United States Circuit Court of Appeals for the First Circuit
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.
Error to the District Court of the United States for the District of
Massachusetts.

Before Bingham, Johnson and Anderson, JJ.

120

Opinion of the Court.

June 6, 1922.

ANDERSON, J.:

These cases involve the validity of taxes imposed upon business organizations, commonly known as Massachusetts Trusts, under the Revenue Acts of 1916 (39 Stat. 789) and 1918 (40 Stat. 1057). Nos. 1551 and 1552 involve the Haymarket Trust and we treat them

one case. The cases were argued as a group and may be conveniently dealt with in one opinion.

The chief business of the Haymarket and Hecht Trusts is that of owning, managing and leasing real estate, and distributing the net income to its shareholders. These concerns deny that they are associations within the meaning of the statutes.

The Crocker Trust is a large manufacturing concern. It admits that it is an association within the meaning of the statutes, but it claims immunity from the tax on the ground that it has no capital stock within their meaning.

The court below sustained the plaintiff's contentions in each case, and the government brought the cases here on writs of error.

The fundamental question is whether the plaintiffs are associations having a capital stock represented by shares, within the meaning of these provisions. So far as the issues in these cases are concerned, the provisions of the two statutes seem to us to be equivalent, for there is now presented no controverted question as to the amount of any tax; we therefore need not consider the different amounts exempt under the two statutes or the retroactive and substitutional effect of the 1918 statute.

The Act of 1916 levies a tax on associations "now or hereafter organized in the United States for profit and having a capital stock represented by shares * * * with respect to the carrying on or doing business by such * * * association * * * equivalent to 50 cents for each \$1,000 of the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included. * * * The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year,"—with an exemption not now material.

The Act of 1918, section 1, includes associations under the term "corporation;" and in section 1000 (a) provides for an annual "special excise tax with respect to carrying on or doing business equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year," etc. "In estimating the value of capital stock the surplus and undivided profits shall be included."

Both acts are conceded to levy an excise tax with respect to doing business, the amount of the tax being measured by the average value of the capital stock, including any surplus and undivided profits as a part thereof. All the plaintiffs agree that they are doing business within the meaning of these acts.

While we recognize that in applying this and every other tax statute reasonable doubts must be resolved in favor of the tax payer (Gould v. Gould, 245 U. S. 151) yet revenue acts are not penal statutes; the Government is not to be crippled by strained and unnatural construction of tax statutes fairly plain.

Cliquot's Champagne, 3 Wall. 114, 145.

United States v. Hodson, 10 Wall. 395.

Worth Brothers v. Lederer, 251 U. S. 507.

Taxation of this general kind began with the passage of the Act of August 5, 1909 (36 Stat. 11, 112), which imposed a tax "on every corporation, joint-stock company or association organized for profit and having a capital stock represented by shares * * * now or hereafter organized under the laws of the United States or of any state or territory * * * with respect to the carrying on or doing business by * * * such corporation, joint-stock company or association * * * equivalent to one per cent upon the entire net income come over and above \$5,000," etc.

This statute, passed before we had the 16th amendment, was attacked as an income tax and therefore unconstitutional. But the Supreme Court held that it was not an income tax, and sustained it as an excise tax. *Flint v. Stone Tracy Co.* (1911), 220 U. S. 122 107. It was measured by the income,—not as under the present law, on the capital used.

In *Eliot v. Freeman*, 220 U. S. 178, the court at the same time held the Act of 1909 not to cover two typical Massachusetts real estate trusts, on the ground that, "The language of the act, 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment." Organized as purely non-statutory, they were exempt.

The gist of the present case is whether the statutes of 1916 and 1918 are, as the plaintiffs contend, to be given the same interpretation in favor of exempting such organizations as was given by the Supreme Court to the Act of 1909.

The government, on the other hand, contends that the language of the acts is plainly applicable to such organizations; that the history of the legislation shows that Congress intended to avoid the result reached in *Eliot v. Freeman*, supra, and that there are no applicable decisions of the courts supporting the plaintiffs' position. We think the government is right, and that the court below erred in holding that such organizations are not associations within the meaning of these Revenue Acts.

The language of the statutes, supra, seems so plain that repetition and paraphrasing would add nothing.

The history of the legislation lends emphasis to the initial impression of its import. For it is elementary, that when language used in an earlier statute has in application received judicial construction, a change in language in later analogous legislation imports legislative purpose to attain a different result. If Congress had intended the acts in question to have the restricted application given by the Supreme Court to the Act of 1909, there was no conceivable reason for changing the words "organized under the laws of the United States or of any state," etc., etc., to "organized in the United States."

We think it plain that by this change Congress intended in the later acts to include non-statutory organizations, and to avoid the restriction found by the Supreme Court in the words of the 1909 act.

We cannot accord with the learned District Judge in his view
123 that "it is hard to discover any substantial distinction between the scope of" the Act of 1909 and the Acts of 1916 and 1918

"as far as 'associations' are concerned." We think there is a vital and controlling distinction.

Eliot v. Freeman was decided in 1911. In 1913 an income tax act was passed (38 Stat. 114, 166), imposing such tax "on every corporation, joint-stock company, or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships." The original case of Crocker v. Malley, 249 U. S. 223, the plaintiffs' chief reliance, arose under this statute. Sitting as District Court, Judge Bingham, in July, 1917, held the Wachusett Realty Company, the predecessor of the present Crocker Association, a trust, according in that regard with Judge Hale in a decision made on May 23, 1914, in the case of Crocker v. Crocker.

But in this court (250 Fed. 817) the organization was held an association within the meaning of the statute. The Supreme Court reversed this court, adopting the view of the District Court. The decisions, both in the Supreme and District Courts, against the government, turned upon the fact that the shareholders had no real control over the trust estate; so that it therefore fell within the doctrine of Williams v. Milton, 215 Mass. 1, from the opinion in which Mr. Justice Holmes quoted (249 U. S. 223, 232) as follows:

"There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. 'The certificate holders * * * are in no way associated together, nor is there any provision in the [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust) they can do is to consent to an alteration * * * of the trust' and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it 'is not to be had in a meeting, but is to be given by them individually.' 'The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.'"

124 The trustees of the Wachusett concern held title, subject to a long lease, to eight mills, and to the stock of the corporation operating these mills, and distributed the net income to the eight beneficiaries of the trust. The trustees were not managing the mills; the organization was not a business enterprise within the normal use of that term. The beneficiaries were "admitted not to be partners in any sense * * * have no joint action or interest and no control over the fund." 249 U. S. 234. The court, in referring to the phrase in the statute "no matter how created or organized," says:

"The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not." Citing Smith v. Anderson, 15 Ch. Div. 247, 273, 274, 277, 282.

Moreover, the tax then sought to be sustained was levied, at least in substantial part, in respect of dividends received from a corporation that itself was taxable upon its net income. The court therefore held that "as the plaintiffs undeniably are trustees, if they are subjected to a double liability the language of the statute must make the intention clear. *Gould v. Gould*, 245 U. S. 151, 153."

It is thus apparent that the Wachusett Realty Company was in organization and purpose but an ordinary inter vivos trust for eight beneficiaries; also that the tax sought to be imposed would have resulted in double taxation, never easily inferred. It was in nature and in relations to its shareholders and to society at large, radically different from the plaintiffs' organizations, described below. That decision lends no support to the plaintiffs' contention.

Next in chronological order was the stamp tax provision of the Act of October 22, 1914 (38 Stat. 745, 775). This act imposed a stamp tax on "each original issue * * * of certificates of stock by any association, company or corporation." This court in *Malley v. Bowditch*, 259 Fed. 809, held such tax applicable on the original issue of certificates or shares of the Pepperell Manufacturing Company "a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute." The crucial question in this case, as in the case at bar, was whether the organization was an association within the meaning of the Federal Tax Act. The case is, in essentials, difficult, if not impossible, to distinguish from the cases at bar. The cogent opinion of Judge Brown is applicable to most aspects of the present problem. It might well be quoted from its length.

The Revenue Acts of 1916 and 1918, *supra*, both in their income and excise tax provisions, adopt the same broad phrasing as to joint stock companies or associations "organized in the United States," thus showing a continuing legislative purpose to avoid the limitation found by the Supreme Court in *Eliot v. Freeman*, *supra*, arising out of the language "organized under the laws of the United States or of any state," etc.

Plainly, there is nothing in this history of legislative and judicial dealing with the matter, lending support to plaintiffs' contention that Congress intended to exempt such business organizations as the plaintiffs. Rather does the history support the natural construction of the acts in question.

We find nothing else in the history of the legislation concerning this and analogous forms of taxes, nor in other cases cited, tending to uphold the plaintiffs' contentions or otherwise calling for analysis and discussion.

A brief description of the three plaintiffs organizations will conveniently precede our final considerations. We take first the Hecht case, agreeing with learned counsel that it is the strongest case for the plaintiff.

On superficial examination, this organization looks somewhat like a family affair, making provision for members of the Hecht family immature or otherwise unfitted for business responsibilities. But

on analysis, we find the organization is a very genuine business concern.

In 1899, members of the Hecht family holding as tenants in common real estate on Federal Street and Atlantic Avenue, Boston, conveyed it to Jacob Hecht, who declared a trust for twelve beneficiaries all named Hecht, who received certificates transferable like ordinary corporation shares, but with a restriction in favor of lineal descendants of Elias Hecht, and, on certain contingencies not now important, to be offered to the trustee before sold to an outsider. The restriction is analogous to the close-corporation provision dealt with in *New England Trust Co. v. Abbott*, 162 Mass. 148. It is in no way peculiar to a trust as distinguished from a corporation. While the Hecht trustee has broad general powers of management, including power to buy and sell, the seat of real power is with the shareholders and not with the trustee; for three-fourths of the shareholders may remove the trustee, three-fifths may terminate the trust or give him binding instructions, and also,—what is of vital importance,—modify the instrument in any particular. This power to modify covers, potentially, the right to extend or change the business so as to make it as large and as corporate in form and function as the Crocker concern, which admits that it has evolved into an association. The Hecht organization is not a trust within the doctrine of the Massachusetts decisions. *Williams v. Milton*, 215 Mass. 1. Compare *Crocker v. Malley*, 249 U. S. 223; *In re Associated Trust*, 222 Fed. 1012. The Hecht trustee has made annual statements showing the assets, liabilities and net income, and kept books, containing a capital account and surplus account. Its stockholders have, sensibly and we think legally, treated their dividends like corporation dividends, in their income tax returns. They have thus by conduct, presumably under the advice of counsel, denied that they are partners taxable under the Act of 1918, sec. 218 (a).

Parenthetically, we note that counsel do not contend that the shareholders of any of these plaintiff associations are partners. There is no suggestion that any of the shareholders in any of the plaintiff organizations have made, propose to make, or could make, tax returns as partners in these business concerns. Manifestly, counsel would deprecate such result as imposing burdens probably much heavier,—certainly difficult if not impossible of ascertaining,—upon the shareholders in such organizations. Their quest is tax exemption, not tax substitution. Compare *Dana v. Treasurer*, 227 Mass. 562, 565; *Frost v. Thompson*, 219 Mass. 360.

Plainly the Hecht Trust is quasi-corporate in form and power. It is an association within the meaning of the Revenue Acts.

The Haymarket Trust, both in genesis and organization, is even more like a corporation. It has none of the aspects of a family affair. It started by securing from the investing public \$250,000 on solicited subscriptions, the trustee paying a commission of \$2,500 to the promoter for thus raising the capital for doing business. The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it also to be quasi-

corporate and an association within the meaning of the Revenue Acts.

Learned counsel in the Crocker case admit that it is an association, but claim exemption on the ground that the concern has no capital stock. This association was evolved from the Wachusett Realty Trust, above referred to. As there pointed out, the shareholders had under the Wachusett declaration no power to amend without the assent of the trustees. But in June, 1917, shareholders and trustees both agreeing, the organization was radically altered. Its name was changed and in express terms it agreed that its form should thereafter be "changed to that of an association," with power to take over and carry on the extensive manufacturing business previously carried on by the corporation whose stock it had held, or any substantially similar business.

The new organization conforms closely to the corporation model,—in powers, in official personnel, and in methods of doing business. It has issued 96,000 shares of no par value, transferable like corporation stock, but with a restriction somewhat like that in the case of *New England Trust Co. v. Abbott*, supra.

Conceding that it is an association with transferable shares, this plaintiff yet seeks exemption on the ground that it has attached no par value to its 96,000 shares. It admits that if it had attached a par value of, say, \$100 to each of these shares, making a capital account of \$9,600,000, a little less than is shown on its balance sheet of July 1, 1917, where the interest of the shareholders is put down as \$9,877,105.16,—the concern would have had a capital stock represented by shares, and thus be an association within the meaning of the Revenue Acts, supra.

We cannot adopt this scholastic and artificial distinction. Cf. *Worth Bros. v. Lederer*, 251 U. S. 507, 510. It is for present purposes immaterial whether the stock of a corporation, of an association, or a joint-stock company has or has not par value. Compare *Gen. Laws of Mass. chap. 156, secs. 14, 15, 47*. Stockholders whether a definite value is or is not attributed to their shares, severally or in mass, own beneficially the net value of the corporation's assets,—that is, whatever may remain after discharging debts.

See

Hood Rubber Co. v. Commonwealth, 238 Mass. 369, 371.

Cook—"Stock Without Par Value," *Am. Bar Ass'n Journal*, October, 1921.

Hollen and Tuthill "Stock Having No Par Value," *Am. Bar Ass'n Journal*, November, 1921, p. 578.

Colton "Par Value v. No Par Value Stock," *Am. Bar Ass'n Journal*, December, 1921, p. 671.

Compare also *Eisner v. Macomber*, 252 U. S. 189, 209 et seq.

Congress intended that this tax should be measured by the average amount of capital used during the tax year in doing the business. The phrase in the statutes as to "including surplus and undivided profits" puts beyond doubt the question of the Congressional intent to measure this tax by business and financial realities, not by book-

keeping forms or mere names. "Fair value" and "fair average value" carry the same notion. Cf. *Wright v. Georgia R. R. et al.*, 216 U. S. 420, 424, 425.

The Crocker Association cannot escape taxation, falling on its competitors, by adopting the modern theory of no par value for its stock. The presumption is against such immunity; it savors of special privilege. Compare *United States v. Dickson*, 15 Pet. 141, 165.

129 It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. See *Sears, Trust Estates as Business Companies*, 1st Ed. 1912, 2d Ed. 1921. Note the long list of industries so organized referred to on pages VI and VII of the preface of the 1921 edition. See *Wrightington on Unincorporated Associations*, 1916. In *Dana v. Treasurer*, 227 Mass. 562, 565, it appears that the Amoskeag Manufacturing Company, commonly known to be one of the largest enterprises in New England, is so organized. The Pepperell Manufacturing Company, before this court in *Malley v. Bowditch*, supra, had a capitalization of over \$7,500,000; the Crocker Trust operates large paper manufacturing mills, employing about 1,000 men, with gross assets of over \$10,000,000.

Such concerns have long been recognized as quasi-corporate in form. In 1904, Chief Justice Knowlton in the Massachusetts Supreme Court said of a typical one of them, in *Hussey v. Arnold*, 185 Mass. 202:

"The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations."

No amplification of words could more accurately and adequately characterize this sort of business organization. Other cases in the Massachusetts reports concerning them abound in similar observations as to their resemblance to corporations. *Williams v. Milton*, 215 Mass. 1, and cases cited. See *Williams v. Boston*, 208 Mass. 497; *Phillips v. Blatchford*, 137 Mass. 510, 515; *Tyrrell v. Washburn*, 6 Allen, 466, 474.

130 But the proposition that they are quasi-corporate in form need not rest merely on our own analysis or on observations found in the decisions of the Massachusetts courts. It has now been distinctly recognized by the Massachusetts legislature; they have a statutory status as associations, not as trusts or as partnerships.

In the decision below, these organizations have been treated as

having no status not arising out of the common law; so also in the briefs of the government and of counsel for the defendant. It seems to have been overlooked that they have acquired in Massachusetts a distinct statutory basis. This, if the question before us were otherwise doubtful, would seem to us of much significance. See General Laws of Mass. (1921), c. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. Compare also Acts of 1921, c. 368. The title of this chapter is "Voluntary Associations."

In section 1 of this act, dealing with definitions, it is provided:

"'Association,' a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."

This definition exactly fits the plaintiffs at bar.

In section 2, it is provided that the written instrument or declaration creating the association shall be filed with the Commissioner of Corporations, and with the clerk of every town where such association has a usual place of business. Section 5 requires the Commissioner to transmit to the Secretary of State copies of such instruments or of any amendments filed during the previous year, to be printed as a public document. The instruments creating such associations are thus made even more generally accessible than are ordinary corporation charters.

Sections 3 and 4 and 7 to 11 deal specially with associations owning stock of public utility companies; they need no present comment.

Section 6,—a re-enactment of the Act of 1916, c. 184, passed subsequent to all the Massachusetts decisions cited and relied upon by the plaintiffs,—has probably the most direct bearing on our present problem; it is as follows:

131 "An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation and service of process upon one of the trustees shall be sufficient."

Here is a distinct enactment that such associations shall be suable in like manner as if corporations. An organization described as an association and made generally liable "to attachment and execution in like manner as if it were a corporation" cannot easily be held in partnership or a trust.

We are not called upon to deal with the confusing and perhaps irreconcilable decisions in the Massachusetts courts concerning the nature and legal incidents of these associations, most of which were made before the passage of this Act of 1916, or with the effect of the legislation upon their powers and liabilities,—except so far as pertains

to our single problem of determining whether these associations are liable to Federal taxation under the Revenue Acts, *supra*. We intimate no opinion on any other question. But when a Massachusetts statute has described such organizations as associations, and has put their liability to ordinary creditors apparently on the same basis as that of corporations, we have no hesitation in reaching the conclusion that they have now been given a statutory basis as quasi-corporate, and that they are associations within the meaning of the Federal Statutes, as well as under the Massachusetts Statutes. We cannot hold Massachusetts associations, liable under Massachusetts Statutes to ordinary creditor as though corporations, not liable under Federal Statutes to taxation imposed generally on corporations, joint-stock companies and associations.

It may be argued that these statutes are distinguished from corporation acts in that their chief functions are to regulate or restrict, whereas corporation acts also empower. Technically, that may be so. But the powers of these voluntary associations are in many respects greater, and the regulations and restrictions less, than in the case of corporations. Broadly speaking, their promoters select and define such powers and provide such limitations of liability, as they desire. Cf. *Hussey v. Arnold*, *supra*. If and in so far, therefore, as the tax in question is directed at "the privilege" or power of doing business through large organizations,—and particularly at the power to obtain money from the outside public on transferable shares,—voluntary association offers at least as much "privilege" as does any corporation form of organization. Associations are resorted to, not because thought weaker, but because thought stronger, than corporations.

If, in construing the statutes, we may look at the policy Congress probably desired to adopt, it could not be overlooked that the plaintiffs' contention, if sustained, would amount to a discriminatory immunity in favor of a kind of business organization, the nature and activities of which have hitherto been the subject of much question and investigation. See the Report of the Tax Commissioner of Massachusetts on Voluntary Associations, under Resolves of 1911, c. 55,—a very interesting document,—in which Commissioner Trefry ably reviewed their origin, history and legal incidents, both in England and in this country; referring, *passim*, and particularly on page 13, to many other documents and legislative reports concerning them. See also a report of the Special Commission to Investigate Voluntary Associations, January, 1914, made under Mass. Resolves of 1912, c. 113. In the Resolve of 1911, c. 55, the Commissioner was required to make an investigation "with a view to determine" *inter alia*, "whether * * * their prohibition * * * is advisable in the public interest."

There is, we think, no conceivable reason why Congress should have desired to favor organizations of this questioned sort by exempting them from taxation to which their competitors in corporate form are subjected. The presumption is plainly the other way. Modern corporation laws furnish adequate machinery for carrying

on every legitimate form of business, including now that of
 133 dealing in real estate. See Gen. Laws of Mass. chap. 156
 passim; sec. 7, authorizing real estate corporations. There
 is no present reason for resorting to this form of organization, ex-
 cept on the theory that more "privileges of doing business" may be
 thus acquired than by conforming to our broad and elastic corpo-
 ration laws. To hold that Congress intended to discriminate in their
 favor would be to disregard the letter, the spirit and the reason of
 the acts.

Our views accord with those expressed by Judge Page in *Chicago Title & Trust Co. v. Smietanka*, 275 Fed. 60. The reasoning of
 Judge Morton in the *Associated Trust* case, 222 Fed. 1012, where
 he reached the conclusion that such an association was an "un-
 incorporated company" within the meaning of the Bankruptcy
 Act, seems to us to sustain our conclusions rather than those reached
 by the learned Judge in the instant cases.

We may summarize our conclusions as follows:

(1) The natural interpretation of the language used in the Acts
 of 1916 and 1918 would include plaintiffs' organizations as asso-
 ciations.

(2) The contrast between the language used in the Act of 1909
 "organized under the laws of the United States or any State," etc.,
 and in the Acts of 1916 and 1918 "organized in the United States,"
 shows that Congress intended to avoid the result reached in 1911 by
 the Supreme Court in *Eliot v. Freeman*.

(3) The manifest general purpose of Congress was to tax business
 deriving powers and making profits from association, particularly
 business done by organizations getting all or a substantial part of
 their capital on transferable shares, such as are commonly sold to
 the investing public.

(4) Prior to the passage of either the Revenue Act of 1916 or
 1918, the Massachusetts Legislature had by the Acts of 1909 and
 1914 expressly recognized such organizations as associations. Con-
 gress used the word "association" as the Massachusetts Legislature
 had previously defined and used it.

(5) By the Act of 1916, the Massachusetts Legislature made
 such associations liable to creditors in like manner as if cor-
 134 porations; by analogy they have similar liability to the Fed-
 eral Government for taxes.

(6) The case of *Malley v. Crocker*, 249 U. S. 223, makes, on
 analysis of the *Wachusett Trust* and the reasoning of the court, no
 for the plaintiffs but for the government. One ground of that de-
 cision was to avoid unjust, discriminatory, double taxation; whereas
 to sustain the plaintiffs' contention, would create discriminatory im-
 munity for a large class of business organizations, thus giving them
 an unfair advantage over their incorporated competitors.

(7) The conclusion now reached accords with the reasoning and decision of this court in *Malley v. Bowditch*, 259 Fed. 809.

In each case the judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion; the plaintiff in error recovers costs in this court.

135 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant,
Plaintiff in Error,

v.

SUMMIT L. HECHT (Substituted for Louis Hecht, Jr.) et al., Trustees, Plaintiffs, Defendants in Error.

136 On April 26, 27 and 28, 1922, these cases came on to be heard, and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the sixth day of June, A. D. 1922, the opinion of the court (page 119) was announced and the following Judgment was entered in each case:

Judgment.

June 6, 1922.

This case came on to be heard April 26, 27 and 28, 1922, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 6, 1922, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the plaintiff in error recovers costs in this court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on the thirtieth day of June, A. D. 1922, the following Motion for Stay of Mandate was filed in each case:

Motion for Stay of Mandate.

[Filed June 30, 1922.]

Now comes the defendants in error in the above-entitled cause and represent to this Honorable Court that they intend to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore they move that the issue of the mandate in the above-entitled causes be stayed pending the determination by said Supreme Court of their petition for said writ, or until the further order of this court.

By their Attorney EDWARD F. McCLENNEN.

137 On the same day, to wit, on the thirtieth day of June, A. D. 1922, the following Order of Court was entered in each case:—

Order of Court.

June 30, 1922.

Upon motion of defendants in error, setting forth that they propose to file a petition in the Supreme Court of the United States for a writ of certiorari, It is ordered that the mandate in this case be and the same hereby is, stayed until further order of this court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

On the same day, to wit, the thirtieth day of June, A. D. 1922, the following Suggestion of Death and Petition to be Substituted Party was filed in No. 1554, Hecht, Jr., et al. v. Malley:—

Suggestion of Death and Petition to be Substituted as Party.

[Filed June 30, 1922.]

And now comes Summit L. Hecht, of Boston, in the District afore-said, and suggests that Louis Hecht, Jr., one of the defendants in error herein, died on the nineteenth day of March, 1922, and that by virtue and in execution of the powers contained in the declaration of trust under which the defendants in error herein were acting, he, Summit L. Hecht, was appointed on May 1st, 1922, co-trustee with Simon E. Hecht, in place of the said Louis Hecht, Jr., deceased.

Wherefore, Summit L. Hecht prays that he may be substituted as one of the defendants in error in place of the said Louis Hecht, Jr., deceased, in the above-entitled cause, and be allowed to defend the same in his stead, nunc pro tunc, as of May 2, 1922.

SUMMIT L. HECHT,
By His Attorney, EDWARD F. McCLENNEN.

138 On the same day, to wit, the thirtieth day of June, A. D.
1922, the following Order of Court was entered in said
cause:—

Order of Court.

June 30, 1922.

Upon the suggestion of death of Louis Hecht, Jr., defendant in error herein, leave is granted Summit L. Hecht to be substituted as defendant in error in place of said Louis Hecht, Jr., deceased.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 138, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 7, 1922, in the causes in said court numbered and entitled, No. 1551. John F. Malley, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error, v. Arthur L. Howard et al., Trustees, Plaintiffs, Defendants in Error. No. 1552. Andrew J. Casey, Acting Collector of Internal Revenue, Defendant, Plaintiff in Error, v. Arthur L. Howard et al., Trustees, Plaintiffs, Defendants in Error. No. 1554. John F. Malley, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error, v. Summit L. Hecht (Substituted for Louis Hecht, Jr.) et al., Trustees, Plaintiffs, Defendants in Error.

139 In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventh day of July, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

140 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which John F. Malley, formerly Collector of Internal Revenue, is plaintiff in error, and Summit L. Hecht (substituted for Louis Hecht, Jr.) et al., Trustees, are defendants in error, No. 1554, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into

the Supreme Court of the United States, do hereby command
141 you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

142 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my

and affix the seal of said court, at Boston, in said First Circuit, his thirty-first day of October, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

43 In the Circuit Court of Appeals of the United States for the First Circuit.

No. 1551.

MALLEY

v.

HOWARD.

No. 1552.

CASEY

v.

HOWARD.

No. 1554.

MALLEY

v.

HECHT.

Stipulation.

In the above entitled cases it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari.

ROBERT O. HARRIS,
United States Attorney;
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
EDWARD F. McCLENNEN,
Attorney for Defendant.

Dated this 30th day of October 1922.

A true copy.

Attest:

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

144 & 145 [Endorsed:] File No. 29,082. Supreme Court of the United States, October Term, 1922. No. 532. Simon Hecht et al., Trustees, etc., vs. John F. Malley, former Collector of Internal Revenue. Writ of Certiorari.

146 [Endorsed:] File No. 29,082. Supreme Court U. S. October Term, 1922. Term No. 532. Simon Hecht et al. Trustees, etc., Petitioners, vs. John F. Malley, former Collector of Internal Revenue. Writ of certiorari and return. Filed Nov. 2, 1922.

147 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which John F. Malley, formerly Collector of Internal Revenue, is plaintiff in error, and Arthur L. Howard et al., Trustees, are defendants in error, No. 1551, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United

148 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

149 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my

hand and affix the seal of said court, at Boston, in said First Circuit, this thirty-first day of October, A. D. 1922.

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

150 In the Circuit Court of Appeals of the United States for the First Circuit.

No. 1551.

MALLEY

v.

HOWARD.

No. 1552.

CASEY

v.

HOWARD.

No. 1554.

MALLEY

v.

HECHT.

Stipulation.

In the above entitled cases it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari.

ROBERT O. HARRIS,

United States Attorney;

FREDERIC S. HARVEY,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

EDWARD F. McCLENNEN,

Attorney for Defendant.

Dated this 30th day of October 1922.

A true copy.

Attest:

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

151 & 152 [Endorsed:] File No. 29,083. Supreme Court of the United States, October Term, 1922. No. 533. Arthur L. Howard and Robert S. Barlow, Trustees, vs. John F. Malley, former Collector of Internal Revenue. Writ of Certiorari.

153 [Endorsed:] File No. 29,083. Supreme Court U. S., October Term, 1922. Term No. 533. Arthur L. Howard et al., Trustees, Petitioners, vs. John F. Malley, former Collector of Internal Revenue. Writ of certiorari and return. Filed Nov. 2, 1922.

154 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Andrew J. Casey, Acting Collector of Internal Revenue, is plaintiff in error, and Arthur L. Howard et al., Trustees, are defendants in error, No. 1552, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court

155 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

156

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this thirty-first day of October, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

157 In the Circuit Court of Appeals of the United States for the First Circuit.

No. 1551.

MALLEY

v.

HOWARD.

No. 1552.

CASEY

v.

HOWARD.

No. 1554.

MALLEY

v.

HECHT.

Stipulation.

In the above entitled cases it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari.

ROBERT O. HARRIS,
United States Attorney;
FREDERIC S. HARVEY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.
EDWARD F. McCLENNEN,
Attorney for Defendant.

Dated this 30th day of October 1922.

A true copy.

Attest:

[Seal of the United States Circuit Court of Appeals, First
Circuit.]

ARTHUR I. CHARRON,
Clerk.

158 & 159 [Endorsed:] File No. 29,084. Supreme Court of the
United States, October Term, 1922. No. 534. Arthur
L. Howard and Robert S. Barlow, Trustees, vs. Andrew J. Casey,
Former Acting Collector of Internal Revenue. Writ of Certiorari.

160 [Endorsed:] File No. 29,084. Supreme Court U. S., Oc-
tober Term, 1922. Term No. 534. Arthur L. Howard et al.,
etc., Petitioners, vs. Andrew J. Casey, Former Acting Collector of
Internal Revenue. Writ of certiorari and return. Filed Nov. 2,
1922.

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